Supreme Court, U.S.
FILED

No. 97-1846 APR 1 1998

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In The

Supreme Court of the United States

October Term, 1997

ANTI-MONOPOLY, INC.,

Petitioner,

vs.

HASBRO, INC.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Do the courts below need Rule 10.1(a) supervision by the Supreme Court, or Rule 10.1(c) review of decisions conflicting with applicable decisions of the Supreme Court, to require their adherence in antitrust cases to the standards required for grant of summary judgment as announced by the Supreme Court in *Poller v. Columbia Broadcasting System, Inc.* and *Anderson v. Liberty Lobby, Inc.*?

2. Does a manufacturer (primary line competitor) have standing under Section 2(a) of the Robinson-Patman Act to maintain "secondary-line discrimination claims" against a competing manufacturer (Hasbro) which acquired its "blocked-entry monopoly" through a series of acquisitions and through illegal discriminatory pricing, market-share discounts, bundled rebates tied to monopolized products, price fixing, boycotting of competitors products regardless of price, and a de facto vertical integration of the top 10 (mass) retailers representing 80% of retail sales, when such practices continued after Hasbro achieved blocked-entry monopoly power?

3. Does Petitioner, the primary line competitor under the second question above, have to prove below-cost pricing by the Blocked-Entry Monopolist (Hasbro) and, if so, has Petitioner made such a showing based on Hasbro market-share and bundled rebates, other volume discounts, markdown money and deductions exceeding 30% as to Toys "R" Us when Hasbro's average profit margin on sales of family board games is 18%-20%?

4. After appropriate objection by a competitor, does Section 7 of the Clayton Act permit an acquisition (by Hasbro of Western Publishing), after a series of 6 earlier Hasbro acquisitions, which final acquisition gives market power in a blocked-entry market?

STATEMENT PURSUANT TO RULE 29.6

Petitioner Anti-Monopoly, Inc. has no parent company and no nonwholly owned subsidiaries.

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TABLE OF CITATIONS

Cases Cited:

American Booksellers Association, Inc. v. Houghton Mifflin Co., 1995 U.S. Dist. Lexis 2522, 1995-1 Trade Cas. (CCH) P70, 931 (S.D. N.Y. 1995)	18
Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 106 S. Ct. 2505, 1986 U.S. Lexis 115, 91 L. Ed. 2d 202, 54 U.S.L.W. 4755, 4 Fed. R. Serv. 3d (Callaghan) 1041, 12 Media L. Rep. 2297 (1986)	i, 17
Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 105 S. Ct. 2847, 1985 U.S. Dist. Lexis 115, 86 L. Ed. 2d 467, 1985-2 Trade Cas. (CCH) ¶66,653 (1985)	27

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Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 1983 U.S. Lexis 128, 74 L. Ed. 2d 723, 1983-1 Trade Cas. (CCH) ¶65.226 (1983) 17, 18, 19

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 110 S. Ct. 1884, 1990 U.S. Lexis 2543, 109 L. Ed. 2d 333, 1990-1 Trade Cas. (CCH) ¶69,019 (1990) 26

Blue Shield of Virginia v. McReady, 457 U.S. 465, 102 S. Ct. 2540, 1982 U.S. Lexis 132, 73 L. Ed. 2d 149, 1982-2 Trade Cas. (CCH) ¶64,791 (1982) 26

Brooke Group, Inc. v. Brown & Williamson Tobacco Co., Inc. 502 U.S. 209, 113 S. Ct. 2578, 1993 U.S. Lexis 4245, 125 L. Ed. 2d 168 1993-1 Trade Cas. (CCH) ¶70,277 (1993) 16, 27, 19, 20, 21

Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 107 S. Ct. 484, 1986 U.S. Lexis 21, 93 L. Ed. 2d 427, 1986-2 Trade Cas. (CCH) ¶67,366 (1986) ... 20, 26

Discon, Inc. v. NYNEX Corp., 93 F.3d 1055, 1996 U.S. App. Lexis 21948, 1996-2 Trade Cas. (CCH) ¶71, 535, *as corrected by*, 1996 U.S. App. Lexis 28747 (2d Cir. 1996) 28

Eastman Kodak Company v. Image Technical Services, Inc., 504 U.S. 451, 112 S. Ct. 2072, 1992 U.S. Lexis 3405, 119 L. Ed. 2d 265, 1992-1 Trade Cas. (CCH) ¶69,839 (1992) 29

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Grand Light & Supply Co. v. Honeywell, Inc., 771 F.2d 672, 1985 U.S. App. Lexis 23052, 41 U.C.C. Rep. Serv. (Callaghan) 1610 (2d Cir. 1985)	27
Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 104 S. Ct. 1551, 1984 U.S. Lexis 49, 80 L. Ed. 2d 2, 1984-1 Trade Cas. (CCH) ¶65,908 (1984)	28
Matter of Toys "R" Us, 1997 FTC Lexis 284 (Docket No. 9273, initial decision 9/25/97	9
O'Connell v. Citrus Bowl Inc., 99 F.R.D. 117, 1983 U.S. Dist. Lexis 13949, 1983-2 Trade Cas. (CCH) ¶65,703 (E.D. N.Y. 1983)	18, 19
Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F. Supp. 455, 1996 U.S. Dist. Lexis 3001, 1996-1 Trade Cas. (CCH) ¶71,362 (S.D. N.Y. 1996)	20, 29
Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 82 S. Ct. 486, 1962 U.S. Lexis 2315, 7 L. Ed. 2d 458, 1962 Trade Cas. (CCH) ¶70,228, 5 Fed. R. Serv. 2d (Callaghan) 886 (1962)	i, 17
R.C. Bigelow, Inc. v. Unilever N.V., 867 F.2d 102, 1989 U.S. App. Lexis 574 1989-1 Trade Cas. (CCH) ¶68,398 (2d Cir. 1989), *cert. denied*, 493 U.S. 815, 110 S. Ct. 64	26

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Smithkline Corp. v. Eli Lilly and Co., 575 F.2d 1056, 1978 U.S. App. Lexis 11880, 1978-1 Trade Cas. (CCH) ¶62,007 (3d Cir. 1978), *cert. denied*, 439 U.S. 838 29

Times-Picayune Publ. Co. v. United States, 345 U.S. 594, 73 S. Ct. 872, 1953 U.S. Lexis 2716, 97 L. Ed. 1277 (1953) 28

White and White, Inc. v. American Hosp. Supply Corp., 540 F. Supp. 951, 1982 U.S. Dist. Lexis 11906, 1982-1 Trade Cas. (CCH) ¶64,722 (W. D. MI, South Div.), *rev. on oth. grounds*, 723 F.2d 495 (6th Cir. 1983), *en banc reh. denied* 29

Wilk v. American Medical Association, 895 F.2d 352, 1990 U.S. App. Lexis 1931 1990-1 Trade Cas. (CCH) ¶68,917 (7th Cir. 1990), *cert. denied*, 496 U.S. 927, 110 S. Ct. 2621 27

Statutes Cited:

15 U.S.C.A. § 1-2 .....1, 2, 16, 17, 21, 27, 28

15 U.S.C.A. § 13(a) ..... i, 1, 2, 4, 20

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Rules Cited:

Supreme Court Rule 10.1(a) ..... i, 17, 24, 26, 27, 29, 30

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Other Authority Cited:

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Anti-Monopoly, Inc. ("Anti-Monopoly" or "AMI") hereby petitions for the issuance of a writ of certiorari to review the decision and judgment of the Court of Appeals for the Second Circuit in Anti-Monopoly, Inc. v. Hasbro, Inc., No. 97-7545, issued on December 2, 1997.

Petitioner was the plaintiff below. There were three defendants originally, including respondent Hasbro, Inc. The other two defendants, Toys "R" Us, Inc. and K-Mart Corporation were dismissed by stipulation and order in the District Court.

OPINIONS BELOW

The 12/2/97 decision of the Court of Appeals for the Second Circuit (Pet. App. A, pp. 1a-2a, *infra*) is reported at 130 F.3d 1101. The 3/31/97 decision of the District Court (Pet. App. B, pp. 3a-28a, *infra*) upon which the Second Circuit based its decision is reported at 958 F. Supp. 895. Earlier decisions of the District Court (Judge McKenna) are reported at 1995 U.S. Dist. Lexis 8822 (6/27/95, Pet. App. C, pp. 29a-51a, *infra*), 1994 U.S. Dist. Lexis 7232 (6/2/94, Pet. App. D, pp. 52a-56a, *infra*), and1994 U.S. Dist. Lexis 6769 (5/23/94, Pet. App. E, pp. 57a-61a, *infra*), . Copies of various discovery-related decisions and opinions by Magistrate Judge Peck are being lodged with the Clerk's Office.

JURISDICTION

The decision of the Court of Appeals was issued on December 2, 1997. On February 18, 1998, Justice Ginsburg granted a timely motion (Application No. A-615) to extend the time within which to file a petition for a writ of certiorari to and including April 1, 1998. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The statutes and rules involved in the case are as follows:

Robinson-Patman Act, § 2(a), 15 U.S.C.A. 13(a) - See Appendix F (62a)

Sherman Act, §§ 1-2, 15 U.S.C.A. §§ 1-2 - See Appendix G (64a)

Clayton Act, § 3, 15 U.S.C.A. § 14 - See Appendix H (65a)
Clayton Act, § 7, 15 U.S.C.A. § 18 - See Appendix I (66a)

STATEMENT

A. Nature of the Case

Plaintiff, manufacturer of the family board game ANTI-MONOPOLY, brought this antitrust action against game manufacturer Hasbro, Inc. ("Hasbro") and game retailers Toys "R" Us, Inc. ("TRU") and Kmart Corporation ("Kmart") for violations of §§ 1-2 of the Sherman Act, §§ 3 and 7 of the Clayton Act, and § 2(a) of the Robinson-Patman Act.

Hasbro, through a series of acquisitions from 1984 to 1995, has acquired a monopoly (70.3%-88% share) in the family board game market in the United States, and has conspired, agreed and combined with the top mass retailers (who themselves collectively dominate the retail toy and games market) to function in what they call a "partnership", which includes the sheltering of the mass retailers from price competition from buying clubs such as Costco and Pace, and from price competition by small retailers; and in turn the mass retailers do not buy games or competing games such as ANTI-MONOPOLY (called "knock offs" by Hasbro), with some anomalous exceptions, from competitors of Hasbro; and the mass retailers stop sales of and remove competing games from their shelves at Hasbro's direction, as part of their protection of Hasbro and the partnership arrangement.

The mass retailers enjoy rebates, allowances, markdowns, below-cost pricing, free games at beginning of year (using year-end "rebates" on all purchases, if earned), market-share discounts and other advantages, including the presence of Hasbro's employees working at Hasbro's expense in their stores, at a cost per year to Hasbro of $36,000 per store (for a total yearly cost to Hasbro of $81,392,000), whereas none of these benefits are given to, or even disclosed or known to, small retailers.

The market-share discounts, which become anti-competitive only when used by a company which already has achieved a monopoly-level share of the market, come into play when Hasbro renegotiates the cost of games at the end of each year with each retailer separately, and pays a volume percentage in annual volume discount for all purchases from Hasbro by the retailer during the preceding year if the retailer purchases 110%, 120% and 130% more this year than last, which market-share, multi-level volume discount and its forfeiture provision discourages all retailers from buying from Hasbro's competitors. Perversely for consumer welfare, Hasbro's market-share discount discourages retailers from buying potentially best-selling games from Hasbro's competitors for fear that success of the game will penalize the retailer when Hasbro calculates the year-end market-share rebate for the retailer.

The district court below granted motions (for summary judgment, and judgment on the pleadings as to the secondary-line claim) by Hasbro dismissing the complaint, and the Second Circuit Court of Appeals affirmed on the basis of the district court's opinion.

B. Brief Summary of the Facts

1. Overall Climate against Antitrust Law Enforcement

The most important fact concerning this and most other antitrust cases is the failure of government agencies to enforce the antitrust statutes, and the courts to provide any relief when a private litigant seeks relief from the courts, such as in the instant case, involving most of the activities prohibited by the antitrust statutes. Without leadership from the United States Supreme Court on antitrust matters, private antitrust enforcement will remain ineffective and the expansion of monopolies, and oligopolies into monopolies, and the decline of business opportunities and the middle class, will continue.

2. District Court Found Evidence of Monopoly Power in Family Board Game Market and High Barriers to Entry

In its opinion (3a), the district court assumed that AMI made a showing of market power by Hasbro in the family board game market (15a-21a), and that there were substantial barriers to entry (18a-21a) in spite of the obvious fact that almost anyone in could design and manufacture a family board game. There are no manufacturing efficiencies involved, and Hasbro and AMI are able to manufacture family board games for approximately the same cost. Hasbro's monopoly power is a "**Blocked-Entry Monopoly**", a term being used herein to denote a monopoly market with great difficulty of entry.

The district court dismissed AMI's claims under § 2(a) of the Robinson-Patman Act by granting judgment on the pleadings (holding that a competing manufacturer could not sue the price-discriminating manufacturer even when the manufacturer had a monopoly), and that as to the other antitrust claims AMI failed to prove antitrust injury or predatory practices.

3. Background of AMI; ANTI-MONOPOLY and MONOPOLY Games; and Family Board Game Market

In 1992, prior to Hasbro's acquisition of market power, AMI had 1/10th of 1% of the family board game market. Between 1992 and the commencement of this action (up to the present), AMI's market share has dropped to near 0% (about 1,000 games per year), in its competition with MONOPOLY, a staple product which every game store must carry. At its height, ANTI-MONOPOLY I sold about 200,000 units per year, and both games a total of more than 1,000,000 units. KMART stopped buying AM during 1991 (when Hasbro acquired Parker Brothers) even though ANTI-MONOPOLY was "selling well" according to KMart.

The market is made up of such other family board games as Monopoly®, Clue®, Sorry!®, Risk®, Boggle®, Ouija® and Trivial Pursuit®.

4. ANTI-MONOPOLY Is an Improved Version of MONOPOLY with Proof of Superiority

MONOPOLY is a plagiarized copy of an Atlantic City public-domain game while ANTI-MONOPOLY is an updated, patented sequel to the Atlantic City game. The patented feature employs higher mathematics to equalize the win chances even though players choose between competition or monopoly rules at the beginning of the game. A respected game magazine reviewed ANTI-MONOPOLY and found it to be a better game than MONOPOLY and ANTI-MONOPOLY was voted the better product at a recent ANTI-MONOPOLY game tournament of seasoned MONOPOLY-tournament players. MONOPOLY is Parker Brothers' leading game, and a game trademark which is so established that the game name is licensed to sell other products, including McDonald's products.

5. Hasbro's 1985-1993 Acquisitions - Market Power 70.3-88%

From 1985 through its acquisition of Western Publishing in 1992, Hasbro acquired a total of at least 7 game companies, including leaders Milton Bradley and Parker Brothers, to give Hasbro a market share increasing from nothing to about 70.3-88%, according to different figures, and growing. These acquisitions include Milton Bradley in 1984, Child Guidance Toy division of CBS toy division in 1985, Tyco game line in 1986, Coleco Industries, Inc. (including Selchow & Righter) in 1989, Parker Brothers through the Tonka acquisition in 1991, and game assets of Western Publishing Group, Inc. after commencement of this action, after the Court's denial of AMI's motion for a preliminary injunction.

The games and puzzles market in 1994 was 14% of the $18 billion toy and games market.

6. Hasbro's Discriminatory Pricing Practices: 1992-Present

Parker Brothers did not appear to practice price discrimination, but after the Parker Brothers acquisition by Hasbro in 1991, Hasbro started a massive scheme of price discrimination which discouraged large retailers such as Toys "R" Us, Kmart, Wal-Mart

and Venture from buying games from other manufacturers, and drove the disfavored (smaller) retailers from the market. These discriminatory practices include rebates; volume discounts; bundled discounts based on all types of games and toys bought from Hasbro; market-share discounts based on increased purchases from year to year; year-end discounts requiring the retailer to maximize its purchases from Hasbro or lose a huge volume rebate for lack of a few dollars in purchases; also, a practice called "deductions" in which large retailers are billed at list but renegotiate the list price at the end of each year, by claiming phony "deductions", refusing to pay the original invoices, and then "renegotiating" the unpaid invoices to a substantially lower amount; and also by advertising and promotional allowances which are not required to be used for any specific purpose, and are not known to or made available to competing retailers. The net effect of these pricing practices is to give large retailers a discount exceeding 20% or more, more than Hasbro's 18%-20% average profit margin on its sales (after taking rebates, discounts and allowances into account). Hasbro's operating profit margin (based on its financial statements) ranges from 10.5% to 12.8%.

7. Hasbro's Predatory Pricing Practices

Hasbro not only sells its games to TRU and other major retailers at discounts exceeding Hasbro's profit margin, but it also sells its games to the major retailers on terms which guarantee the retailers against any loss on unsold inventory, by reducing the price to a single major retailer (and to no others) below Hasbro's cost, so that the favored retailer can offer the game to its customers at an exceedingly low price (while all other retailers are still paying the higher price to stock more of the games). The retailer's price in these transactions is set by agreement with Hasbro, and constitutes price fixing.

In 1994, the total rebate of Hasbro to TRU amounted to **30.9%** (9% in what was called "promotional allowances", + 1.5% in "defective allowance", + 1% in "markdown allowance" + 19.4%

in "deductions"), which aggregate discount exceeded Hasbro's profit margin and made sales to TRU below Hasbro's cost. Sales to TRU represents 25% of Hasbro's business. Hasbro has to deal with the dominant firm in a oligopsony (oligopoly of purchasers) more favorably than with the others, to ensure that Hasbro's competitors cannot sell to TRU, without which access no Hasbro competitor can survive. See ¶) 12 below.

8. Hasbro's Predatory Practice of Selling Its Games without Ascertainable Prices

Hasbro, since acquiring its monopoly, through a series of acquisitions, in the family board game market, has introduced a predatory pricing system of selling its games without ascertainable prices, with pricing to be determined as much as one year later. This is one of the most competition-injurious Hasbro practice, inducing retailers not to buy from other manufacturers for fear of losing (i.e., forfeiting) a rebate plateau and a rebate percentage (say 1-2%) on all purchases by the retailer from Hasbro during the preceding year. This is a cost which the retailer adds in his mind when deciding whether to buy from any other manufacturer. Retailers predictably will not risk losing this end-of-year determined volume discount to buy from other game manufacturers (with limited exceptions). A former salesman testified that Hasbro intended, in due course, to take away all competing sales with this year-end market-share rebate program. At the beginning of the new year, the market-share rebate, if earned must be used to "buy" Hasbro games, which is another way of saying that Hasbro is selling these games to the retailers for zero, additional below-cost sales at the most critical ordering time. Retailers told AMI's distributor that they can buy from Hasbro's competitors only if, after ordering from Hasbro, the retailers have any "open to buy" dollars left or "any available board game shelf space", or can buy "only to dole out leftover purchasing". This is not a healthy, competitive game market which the antitrust laws are designed to foster.

9. Other Hasbro Predatory Practices

Hasbro since 1993 has been putting its own employees into the stores of the top game retailers in the United States and paying the salaries, at a cost per store of about $36,000 per year (amounting annually to $81,392,000 for the 2,272 stores of the top 10 retailers). These personnel are supposed to divert customers to Hasbro games and stock all games for the retailer (giving Hasbro an edge on the shelf positioning). Hasbro's admitted purpose in this "Top 10 Program" was to have Hasbro items occupy more shelf space than Hasbro items would otherwise occupy.

Also, Hasbro has entered into "partnership" agreements with hundreds of the top retailers to create a close business relationship between Hasbro and each of such retailers (all of whom are receiving discriminatory prices).

10. The "Partnership" Arrangements between Hasbro and the Top 10 Retailers

The partnership arrangement has the following aspects:

(i) wholly secret and discriminatory pricing practices by Hasbro with every mass-retailer deal negotiated separately, including predatory pricing, monopoly leveraging (e.g., higher discounts on non-monopolized games based on sales of monopolized games), full-line forcing and tie-in sales practices and price fixing; and through the negotiation and setting of TRU's profit margins and retail prices on certain games as a condition to being sold such games;

(ii) refusals by Hasbro to sell to buying club retailers (who sell at the lowest retail prices) to protect Hasbro's partners from price competition;

(iii) an array of discounts, fees, rebates, allowances, advertising and promotional programs, invoice forgiveness or annual year-end negotiated rebates (called "deductions"), with TRU excessive deductions amounting to 15-20% of gross sales, advance showing

of Hasbro's new game line months prior to Toy Fair, and exclusive "markdown" prices to one mass retailer at a time, and a year-end division of the profits of the enterprise through "deductions" negotiations and settlement, and through Hasbro's year-end annual rebate. All of this makes the mass retailer partner unwilling to purchase games from Hasbro's competitors, to avoid hurting the partnership, Hasbro and the retailer's own profitability being based on Hasbro's monopoly;

(iv) the placing of Hasbro employees in each of the stores of the mass retailers at a cost saving to the retailer of $36,000 per store, a yearly rebate to mass retailers of $81,392,000;

(v) the exclusion of small retailer competitors from the array of discounts, rebates, fees, allowances and advertising and promotional programs which Hasbro makes available to the mass retailers, and

(vi) other anticompetitive activities using Hasbro's monopoly in the family board game market.

11. Hasbro Tells Retailers Not to Stock Competitors' Games

In 1995, Hasbro's 2nd highest official saw a competing game (TUMBLING TOWERS) on the shelves of Toys "R" Us and directed TRU's C.E.O., Lazarus, who accompanied him at the time, to take the game off TRU's shelves, which TRU did (in spite of its 50% profit margin for TRU). Hasbro admittedly did this same thing with other items as well. Mass retailers obtained their favored position with Hasbro (buying games at lower prices than their smaller competitors and receiving protecting from price competition of discount buying clubs such as Costco, Sams and Pace -- see 192-page (Lexis) decision in *Matter of Toys "R" Us*, 1997 FTC Lexis 284 (Docket No. 9273, initial decision, 9/25/97).

In exchange for such price protection by Hasbro, TRU reciprocated by not buying games from Hasbro's competitors, and the mass retailers divided up the profits at the end of the year through

the renegotiation of their unpaid Hasbro invoices in the process known as "Deductions". The effect of Hasbro's dealings with the large retailers is to vertically integrate them into Hasbro through this de facto partnership arrangement with Hasbro, which discourages them from buying games from competing manufacturers, such as AMI.

12. FTC Finds TRU Conspired with Hasbro

In the FTC decision , *supra*, which decision was hand-delivered to the 2nd Circuit panel), the FTC found At ¶ 178 of the FTC decision, it was stated: "[Hasbro's] Verrecchia had complained to TRU that it was selling knock-offs of Hasbro merchandise and 'that was one of the things he hoped to gain in return.", and at ¶ 180 "The effort by Hasbro to seek concessions from TRU, including knock offs, is corroborated in a Hasbro document ..." [as well as in various Exhibits of AMI. The FTC decision also stated at ¶¶:

> 419. ... The mass merchants are losing share because they can't compete with the toy supermarkets on price and selection and can't compete with the disc[ount buying clubs] on price. ... Other retailers include mom and pop toy stores, department stores, high priced toy stores like FAO Schwartz and convenience stores such as variety stores, drug stores and supermarkets. **These retailers are losing share to the toy supermarkets and discount[er]s because of price** and to Kay-Bee because of convenience. **So, just as there is consolidation in the toy industry with Hasbro, Mattel, Tyco gaining huge market shares, there is also consolidation in toy retailing with Toys R Us, Wal-Mart, Kmart and Kay-Bee gaining large market shares.** I see this consolidation continuing with intensity in the 1990's. [Emphasis added.] * * *
>
> 438. Mattel and Hasbro need TRU's purchases, the "critical mass" is essential for continued production. If TRU did not purchase older, basic toys, manufacturers could not profitably make them. .... * * *

462. ... it is difficult to enter as a significant competitor on a national basis. .. Business documents from the manufacturers and TRU describe a consolidated industry. * * *

514. TRU is the most expensive customer for Mattel and Hasbro.

It should be noted, Hasbro does not assert any cost-justification defense.

13. Hasbro Fixes Prices with Top Retailers

When Hasbro rebates money to the top retailers through allowance of "markdown money", this money is a rebate of the retailers' purchase price (not even paid because of the "Deductions" practice) to permit the dealer to sell the specific game at a "markdown" price, which price is set by agreement of Hasbro and the retailer. This setting of the price for the game is price fixing, and the practice occurs between Hasbro and only one retailer at one time for a given game, with no other retailers being advised of the markdown. All other retailers continue to pay for that game at Hasbro's list price (subject to whatever rebates and allowances the retailer has previously negotiated with Hasbro). Markdown money represents a rebate of about 1% to 1.5% per year for the top retailers.

14. Hasbro Practices Results in Higher Wholesale Prices to the Favored Retailers and Higher Retail Prices to the Consumers

TRU does not consider purchasing standard games such as parcheesi from anyone but Hasbro, even when offered lower prices by others. Top retailers are not interested in adding to their vendor base, irrespective of price considerations. As one would expect, Hasbro's market power allowed it to raise retail prices in all retail outlets by its newly-acquired board game companies, Parker Brothers and Milton Bradley between 1991 and 1993, either above the increases in the comparable Games and Puzzles market or by holding price declines below comparable price declines in the comparable market. This held for five out of the six available statistics.

15. Hasbro Has Achieved Effect of Vertical Integration - 70.3-88% of Retail Market

As stated before, as a result of Hasbro's price-discrimination practices and its "partnership" dealings with the major retailers, including the annual divvying up of Hasbro's profits through the "Deductions" process, Hasbro has brought about 80% to 85% of the retail market for toys and games and family board games into its control in what amounts to vertical integration, in which Hasbro dominates, and the retailers are unaware of what price each is paying, and all retailers are paying different prices to Hasbro, in what amounts to a classic way of exploiting a monopoly position, to charge each customer whatever the market will bear. The FTC decision held that there were both horizontal and vertical agreements among TRU and competing manufacturers, including Hasbro (Lexis pp. 146-178).

16. Mattel Unable to Compete - 0% of Family Board Game Market

Mattel tried to compete with Hasbro in the family board game market using former Hasbro personnel, but was not successful. Mattel (a company larger than Hasbro) still is unable to compete with Hasbro in the family board game market, and tried to overcome this through a hostile tender offer which Hasbro fought off, successfully, based in part on this suit, claiming that it raised antitrust matters which should be resolved first.

17. Change in Game Market Place

Because of Hasbro's practices, the smaller game manufacturers have been driven out of business; there is no ease of entry; Mattel cannot compete with Hasbro in the all-important family board game market, and small game retailers have left or are leaving the market, with Hasbro increasing its share of the retail market (through its "partnership" with the major retailers) each year. Hasbro now enjoys about 80-85% of the retail sales, and to put it in Hasbro's own words, " "*We own the wall!*", because of 66 games stacked in TRU shelves via Planogram arrangement, 55 are Milton

Bradley items, 10 are Parker Brothers items, 1 is Western [not yet acquired by Hasbro], and 1 is Pressman Toy".

Hasbro's benefit in using this program "*is that we will continue to maintain a huge advantage vs. our competition. Otherwise, store personnel will determine our shelf position.*" Another Hasbro memo stated that Hasbro's program gave Hasbro the "*Ability to dominate retail conditions*" and get "Increased product exposure". Also, Hasbro uses its access to the stockroom to find and warn Hasbro about the retailer's plans to sell knock-offs (competing games from other manufacturers), which discourages even the top 10 retailers from buying competing products.

Hasbro determined in 1994 that its newly-formed Retail Merchandising Organization Program ("RMO") created an increase in sales for Hasbro in the affected retail stores amounting to more than 12% per year. Hasbro stated: "huge advantage vs. our competition"; and "otherwise [the retailers' own] store personnel will determine our shelf position". It would not take long for 12% sales increases to eliminate the remaining market share not yet owned by Hasbro.

18. Instant Recoupment of Below-Cost Sales

Hasbro's dominant position in the retail stores enables it to sell selected family board games below cost from time to time, and drive persons into the favored retail stores, where they buy other Hasbro items from the shelves as well, and Hasbro obtains instantaneous recoupment of its below-cost sales, through its sales of other items which are already rebate-bundled as stated before. Also, it should be noted that a Blocked-Entry Monopolist has no problem in obtaining recoupment, especially an increasing monopoly, because when all the competitors are either acquired or eliminated, there is no one left to provide any price competition. See Judge McKenna's similar observation at bottom of 48a. Moreover, the higher retail prices during recoupment cannot attract new competition.

19. No Retailer Has Sued Hasbro

No retailer has ever brought suit against Hasbro before or after Hasbro acquired its market power. The only company to do so is AMI, one of Hasbro's few remaining competitors. The retailers have no idea of Hasbro's pricing and other practices as described above, and assume that because there is a piece of paper stating "list price" that all retailers are getting the same price. The mass of evidence was filed under seal in the courts below at Hasbro's insistence and AMI was not even permitted by court decision and order to transmit its evidence to the FTC. The retailers know something is wrong, however, when major retailers are selling Hasbro games for a lower price than the disfavored retailer is paying. But, then, this might be a retailer offering a loss leader. How does any other retailer know. The deposition testimony was that no retailer knew what prices, discounts or rebates were being given by Hasbro to other (major) retailers.

Requiring a retailer to enforce the Robinson-Patman Act against a monopolist is overly optimistic and a major factor against antitrust enforcement. Retailers dependent on the monopolist for their inventory (and to remain in the retail business) are not apt to sue, especially when under antitrust law the monopolizing manufacturer does not have to continue dealing with the suing retailer. Accordingly, the one most apt to sue is a competing manufacturer (such as AMI) injured by the price-discrimination violations and other predatory practices of the monopolizing manufacturer (Hasbro).

If a competing manufacturer has no standing to challenge these practices which have destroyed an industry and have created a monopoly, which is still growing, the antitrust laws truly have no meaning like many persons do believe, unless the Supreme Court steps in to provide its needed assistance.

20. Effect of Monopoly - Tripling of Hasbro's Sales of Games Acquired from Western Publishing; and Mass Retailers' Unwillingness to Buy Successful Competing Games

In the market as rigged by Hasbro, only Hasbro can profit. Western Publishing ("Western"), which had a variety of great-selling games (especially PICTIONARY and TRIVIAL PURSUIT), could not profit any longer and sold out to Hasbro, which immediately saw how it could quintuple sales of PICTIONARY, a Western-acquired game, and double, triple or quadruple the sales of other Western-acquired game, in the marketplace now dominated by Hasbro. STAK ATTACK, a competitor of Milton Bradley's No. 1 game JENGA met a similar fate, being removed from Kmart's shelves while the game was selling successfully ($9.95 retail v. JENGA's $12-14 retail price; and selling at wholesale at $3-4 less than JENGA's wholesale price). These sales created a risk to Kmart that Kmart would lose its year-end market-share rebate from Hasbro.

21. Substantial Record Created in Courts Below

There is no lack of evidence. AMI has 3 exhibit volumes (2639 pages of appendix) in the Second Circuit, culled from a much larger record in the District Court below (perhaps 25,000 pages), expert opinions from 2 AMI economists and 2 others, declarations of 4 retailers, depositions of former Parker Brothers and Milton Bradley salesmen, depositions of small manufacturers, depositions of TRU and Hasbro's 3 highest officials and Hasbro's former in-house accountant, among many others, and 123 boxes of document production by Hasbro, Parker Brothers, Milton Bradley, TRU and Kmart amounting to about 300,000 pages of documents (not including deposition transcript pages and data processing records).

REASONS FOR GRANTING THE WRIT

I.

THE LOWER COURTS NEED TO BE SUPERVISED AS TO THEIR TREATMENT OF ANTITRUST CASES

Brooke Group, Inc. v. Brown & Williamson Tobacco Co., Inc., 502 U.S. 209, 113 S. Ct. 2578, 1993 U.S. Lexis 4245, 125 L. Ed. 2d 168, 1993-1 Trade Cas. (CCH) ¶70,277 (1993), if applied to Blocked-Entry Monopolies (a term created for this petition and argument), undermines the antitrust laws by making Section 2 of the Sherman Act virtually meaningless. Monopolists (of the blocked-entry) type use their monopolies to maximize their profits and routinely exploit their monopolies by selling at whatever price the market will bear, and with no significant competitive market, the price will be high, except where the monopolist sells below cost to one major retailer to prevent other competitors from gaining access to that vital outlet (which is TRU). This exploitation by selling at different prices to competing retailers is, of course, a continuing violation of the Robinson-Patman Act, an act which has no enforcement activity by the Justice Department and little by the FTC. If *Brooke* is not made inapplicable to Blocked-Entry Monopolies by the Supreme Court, there is really little meaning left in Section 2 of the Sherman Act. Accordingly, under Supreme Court Rule 10.1(c) ("has decided an important question of federal law which has not been, but should be, settled by this Court") the Supreme Court should settle this ambiguity in the *Brooke* decision and make a clear-cut determination of whether *Brooke* applies or not to Blocked-Entry Monopolies.

Finally, this Court should look at the record in this case to see how the Courts below are throwing out antitrust cases such as the instant case by stating, in their opinions, that there is insufficient evidence (2a and 26a). See paragraph 21 above. The evidence was overwhelming as to what Hasbro is doing, evidence that affected competition and all competitors including AMI. There was no evi-

dence that Hasbro's practices were directed against AMI as distinct from all competing manufacturers. And even larger Mattel, hiring former Hasbro executives and publicly announcing it plan to enter the market, could not penetrate the family board game market, and wound up with a zero share.

Supreme Court Rule 10.1(a) and Rule 10.1(c) supervision of the lower courts (including but not limited to the Second Circuit and the Southern District of New York) in antitrust cases is needed to ensure compliance with the Supreme Court's decisions in *Poller v. Columbia Broadcasting System, Inc.*, 368 U.S. 464, 82 S. Ct. 486, 1962 U.S. Lexis 2315, 7 L. Ed. 2d 458, 1962 Trade Cas. (CCH) ¶70,228, 5 Fed. R. Serv. 2d (Callaghan) 886 (1962); and *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 106 S. Ct. 2505, 1986 U.S. Lexis 115, 91 L. Ed. 2d 202, 54 U.S.L.W. 4755, 4 Fed. R. Serv. 3d (Callaghan) 1041, 12 Media L. Rep. 2297 (1986) ("the plaintiff must present affirmative evidence in order to defeat a properly supported motion for summary judgment"). These two decisions are routinely being obviated by an overloaded and understaffed federal court system. If this Court does not look into the way the 2nd Circuit handles private antitrust cases, one can expect the decline in Sherman 1 and 2 and Clayton 3 and 7 cases to continue and illegal mergers/acquisitions to continue and monopolies to grow.

II.

AN INJURED MANUFACTURER SHOULD HAVE STANDING UNDER *ASSOCIATED GENERAL* ANALYSIS TO SUE A COMPETITOR HAVING BLOCKED-ENTRY MARKET POWER FOR § 2 ROBINSON-PATMAN ACT VIOLATIONS WITHOUT ANY SHOWING OF BELOW-COST PRICING; *BROOKE* DECISION DOES NOT APPLY TO A MONOPOLIZED MARKET

This point refers solely to the "secondary-line" discrimination claims which the district court dismissed by grant of partial judg-

ment on the pleadings (27a), which was affirmed by the Second Circuit (2a).

The district court's decision (Appendix B) was based on "lack of standing" for AMI to pursue secondary-line claims (23a), for (i) failure to articulate how injury took place; (ii) failure of any small retailers, as more direct victims, to have sued in their own behalf; (iii) failure to show the practices resulted in the industry consolidation; (iv) lack of factual support to AMI's theory, which is too indirect, speculative and tenuous.

The district court did not consider whether any distinction should be drawn when the discriminating manufacturer (Hasbro) has monopoly power.

The district court granted judgment on the pleadings as to AMI's secondary-line discrimination claims citing *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 103 S. Ct. 897, 1983 U.S. Lexis 128, 74 L. Ed. 2d 723, 1983-1 Trade Cas. (CCH) ¶65,226 (1983) and *Brooke*.

A. Lack of Lawsuits by Any Retailers; Lack of Retailers' Knowledge

The district court felt it was curious that no small game retailers have brought suit against Hasbro under the Robinson-Patman Act (22a). The court did not discuss that small retailers were unaware of the price discrimination (see declarations of 3 retailers); that Hasbro kept all of its price-discrimination activities secret, including the separate negotiations with each mass retailer, so that even the mass retailers did not know what deals the others had with Hasbro. Also, the court did not indicate why a dying part of the game industry should be expected to sue, particularly when class actions for monetary recovery generally are not allowed under the Robinson-Patman Act. *American Booksellers Association, Inc. v. Houghton Mifflin Co.*, 1995 U.S. Dist. Lexis 2522, 1995-1 Trade Cas. (CCH) P70,931 (S.D.N.Y. 1995), and *O'Connell v. Cit-*

rus Bowl Inc., 99 F.R.D. 117, 1983 U.S. Dist. Lexis 13949, 1983-2 Trade Cas. (CCH) ¶65,703 (E.D.N.Y. 1983). The court did not mention that there has been a sharp decline in commencement of antitrust suits during this period, with less possibility that any retailer would have brought suit. Nor was there any analysis of how a small retailer would pay $1,000,000 in legal fees and expenses to maintain a suit to recover probably less than $100,000. The thousands of small retailers could not be expected to bring suit, and in fact (predictably) did not, which means that an analysis should have determined that any enforcement would have to come from a competing manufacturer, such as AMI.

The problem in a monopolized market is that it is illogical to assume that an injured retailer would sue, because he would then expect to be cut off by the manufacturer and have to go out of business.

In fact, no retailer has sued Hasbro for its price discrimination, which has permitted Hasbro to grow and grow into the monopoly power which it now enjoys, eliminating small retailers and small manufacturers along the way. The only hope for enforcement in this situation is for a suit by a competing manufacturer.

Accordingly, under *Associated General* analysis, AMI should not have been summarily rejected for standing to pursue damages for injuries resulting from secondary-line discrimination by Hasbro.

B. *Brooke* Does Not Apply in Monopolized Market

The court held that AMI did not show predatory pricing, and that under *Brooke, supra*, a competing manufacturer must show predatory pricing to have a claim for price discrimination. Also, the competing manufacturer must show a reasonable possibility of recoupment.

AMI argues that *Brooke* should not be applied when the price-discriminating manufacturer has a Blocked-Entry Monopoly (and

there are substantial barriers to entry, as in the instant case). *Brooke* involved activities by a non-monopolist in an oligopolized market with easy entry.

The principles of *Brooke* do not apply to a Blocked-Entry Monopolized market with a tying arrangement, as we have in the instant case. See *Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc.*, 920 F. Supp. 455, 468, 1996 U.S. Dist. Lexis 3001, 1996-1 Trade Cas. (CCH) ¶71,362 (S.D.N.Y. 1996) (monopolist loses immunity for above-cost pricing when it ties prices of non-monopolized products to its prices for its monopolized products, in a pricing scheme to deter primary-line competition). The monopolist has the ability to obtain instant recoupment from sales of other items which it sells to the retailers, even while it is selling its family board games below cost; and it is protected from having to share benefits from future price increases with new entrants.

But more importantly, there is no reason that AMI (a competing manufacturer) has to show below-cost sales by the price-discriminating manufacturer. The activities of the manufacturer are unlawful under § 2(a) of the Robinson-Patman Act, and injured retailers were unaware of their claims because of Hasbro's pricing practices (secret rebates, discounts and allowances to mass retailers) from non-published price lists, with different prices for mass retailers than for small retailers).

The issue of whether a competitor such as AMI must show predatory pricing in a Robinson-Patman price discrimination case when the defendant has a monopoly was not discussed or decided in the *Brooke* decision, and the issue was left open in *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 110, 107 S. Ct. 484, 489, 1986 U.S. Lexis 21, 93 L. Ed. 2d 427, 1986-2 Trade Cas. (CCH) ¶67,366 (1986).

In *Cargill*, at p. 118, n. 12, the Court left open the question of above-cost pricing, as follows:

n 12 * * * No consensus has yet been reached on the proper definition of predatory pricing in the antitrust context, however. For purposes of decision in Matsushita * * * we defined predatory pricing as either '(i) pricing below the level necessary to sell their products, or (ii) pricing below some appropriate measure of cost.' * * *(CA9) (pricing above average total costs may be deemed predatory upon showing of predatory intent) * * * [The lower courts'] use of the term is consistent with a definition of pricing below cost. Such a definition is sufficient for purposes of this decision, because only below-cost pricing would threaten to drive Monfort from the market, * *, and because Monfort made no allegation that Excel would act with predatory intent. Thus, in this case, as in Masushita * * * we find it unnecessary to 'consider whether recovery should ever be available . . . when the pricing in question is above some measure of incremental cost.' 475 U.S., at 585, n. 9, or whether above cost pricing coupled with predatory intent is ever sufficient to state a claim of predation. * * *

The Supreme Court in furtherance of Rule 10.1(c) should determine whether it is the law of this land that competing manufacturers cannot enforce Section 2 of the Robinson-Patman Act when the discriminating manufacturer has a Blocked-Entry Monopoly. See "Recouping the Losses of Brooke Group", 73 Wash. U. L. Q. 609-634 at 611 which urges lower courts not to extend the *Brooke* doctrine, as follows:

> [T]his Note concludes that the Supreme Court should remove the recoupment requirement. In the absence of such a ruling, the lower courts should not enforce the requirement strictly in future antitrust litigation.

C. Anti-Monopoly's Evidence

AMI does not have any documents or testimony which states that Hasbro did what it did to put AMI out of business, or to stop

sales of ANTI-MONOPOLY. What AMI found was extensive evidence of what Hasbro is doing, with expert reports that such practices (such as substantially higher prices to small retailers) resulted in small retailers being less able to compete; that the practices would result in Hasbro taking market share from all competitors; that favorable prices to the top 10 resellers together with price protection from small retailers and the buying clubs, and year-end rebates based on the retailers' total purchases from Hasbro, with different rebate plateaus, would induce the retailers not to buy from independent manufacturers such as AMI; and that retailers would not buy from Hasbro's competitors for fear of losing the year-end multi-level market-share volume discount.

Hasbro's discriminatory pricing practices speak for themselves, were clearly stated in the courts below, and should permit a trial of the matters at issue. The evidence consisted of memos and testimony which confirmed the secret nature of the rebates, deductions, allowances, discounts and other payments and benefits, none of which were set forth in any document such as a price list or other list of benefits available to retailers. The benefits were handed out to the favored retailers through separate, unpublished negotiations, and the retailers themselves were never made aware of how much credit they had towards their year-end volume plateaued rebate, which discouraged all retailers from buying from independents for fear of missing (forfeiting) the plateau.

This year-end plateau rebate was a cost added to the games of independent manufacturers which was too much for them to overcome, the loss of perhaps $100,000 in rebates for failure to buy $100 in games to meet the next plateau. The addition of this cost to competitors in a monopolized market, with Hasbro's bundled rebate applying across the board to all purchases from Hasbro, was the leveraging of Hasbro's monopoly through these year-end multi-level volume discounts, and something which competitors could not overcome, assuming they even knew what was happening, which they did not. These pricing policies of Hasbro were kept se-

cret and not included in Hasbro's price list. They were kept on forms which detailed the salesman's negotiations, and the retailer did not get a copy of the form.

D. Summary

In summary, a competing manufacturer should have standing to attack unlawful (secondary-line) pricing practices of a manufacturer with market power, because such practices injure primary-line competition and result in further monopolization without any efficiency and without the ability of another manufacturer to compete on a price basis.

III.

AMI PROVIDED EVIDENCE THAT HASBRO WAS SELLING GAMES BELOW COST TO THE 10 TOP RETAILERS WHILE CONTINUING TO SELL THE SAME GAME AT FULL LIST PRICE TO SMALL RETAILERS - AS PART OF HASBRO'S DIVISION OF ITS PROFITS WITH ITS RETAILER PARTNERS

AMI provided substantial evidence showing that Hasbro was selling games at below cost, primarily in these two areas: (i) markdown money; and (ii) deductions.

The markdown money (averaging 1.5% of a top retailers purchases from Hasbro) was given on a case by case, negotiated basis, upon request of a top 10 retailer, with the retailer having to agree to the retail price at which the retailer sold off the inventory. At the same time, Hasbro's own inventory of the "marked down" game was being sold to all other retailers at the list price (subject to whatever deals Hasbro had with each retailer). The markdown money exceeded Hasbro's profit margin and exceeded this measure of Hasbro's cost.

Deductions was a more blatant way of selling below cost. Hasbro would permit the top retailers not to pay their invoices, and at the end of each year would negotiate a reduction of the invoices to reduce them sometimes 100%, and often 50%, which amounted to below-cost selling by Hasbro. This evidence came from deposition testimony of a former in-house accountant for Hasbro, and others.

The issue of whether AMI had sufficient evidence in this all important area of antitrust enforcement should be reviewed by the Supreme Court as a matter falling within Supreme Court Rule 10.1(a) ("call for an exercise of this Court's power of supervision") and 10.1(c) ("decided a federal question in a way in conflict with applicable decisions of this Court").

IV.

HASBRO'S ACQUISITION OF WESTERN PUBLISHING'S BOARD GAME ASSETS IN 1994-95 WAS A VIOLATION OF § 7 OF THE CLAYTON ACT, 15 U.S.C.A. § 18 AS AN ACQUISITION HAVING THE TENDENCY TO MONOPOLIZE

Section 7 of the Clayton Act, 15 U.S.C.A. ¶ 18 prohibits acquisitions which "tend to [or, presumably] create a monopoly." Without its monopoly in the family board game market, Hasbro would not be able to get away with its anticompetitive activities described above, including unlawful tying arrangements, extension of the monopoly to the mass retailers through combination, conspiracy and agreement resulting in a group boycott of AMI and other Hasbro competitors.

Without a monopoly, Hasbro would have to contend with price competition from competitors, but competitors are virtually non-existent, and becoming more so every day.

Toy giant Mattel cannot compete in the family board game market. It has tried, but has failed to enter. Mattel's market percentage is zero.

AMI was doing well until Hasbro made its acquisitions.

Western Publishing failed and its game assets were bought by Hasbro, which immediately was able to predict that it could sell four times the amount of the top Western game (PICTIONARY) than Western had been able to sell. Because Western could not sell these games in the monopolized market it failed; and was forced to sell its game assets to Hasbro, which was immediately able to make sales of Western's top game increase by 400% .

The only ones left in the market are selling generic or "standard" games, which Hasbro does not want to sell, or is at least ambivalent about continuing to sell, because of their low profit margin and because Hasbro admits "We are priced over 50% higher than the deals offered by our two major competitors, Pressman and Western". Hasbro had a proposal to make its competitors "squirm" by offering standard games at "hard cost", which means below cost under some types of calculation. Hasbro offers checkers at $1.71 while Pressman offers it at $1.12 and Western at $1.15. Hasbro has no efficiencies in size. Hasbro admits that "it's apparent that we're not competitive even at our GSP with 0% profit".

The acquisition of these family board game companies, including Western's game assets, gave Hasbro the monopoly it needed to restructure the industry, which included putting the top retailers together in a combination with Hasbro to sell Hasbro's games to the exclusion of competing games whenever possible; and the protection of such mass retailers from discounters such as Costco selling at lower prices (10% markups) than the mass retailers (27.5% to 50% markups); and by charging excessive, discriminatory prices to small retailers and not even bothering to provide them with any salesperson to give them information or take their orders.

These acquisitions by Hasbro created the present monopoly, and have been used to extend it further, by increased share, and by coercing sales in markets not yet dominated by Hasbro.

The Western acquisition was in violation of § 7 of the Clayton Act, 15 U.S.C.A. § 18. Exclusion of AMI and other Hasbro competitors from the market is one of the anticompetitive effects of the Western asset acquisition together with the partnership agreement between Hasbro and the mass retailers, thereby meeting the requirements of *Blue Shield of Virginia v. McReady*, 457 U.S. 465, 481, 102 S. Ct. 2540, 2549, 1982 U.S. Lexis 132, 73 L. Ed. 2d 149, 1982-2 Trade Cas. (CCH) ¶64,791 (1982). AMI had made its required showing of antitrust injury (exclusion from the mass retailer market) under *Cargill, supra*. Anticompetitive conduct does not have to be predatory pricing. *Atlantic Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 341, 110 S. Ct. 1884, 1893, 1990 U.S. Lexis 2543, 109 L. Ed. 2d 333, 1990-1 Trade Cas. (CCH) ¶69,019 (1990) and *Cargill, supra* at 341.

Cargill does not limit anticompetitive activities under § 7 to predatory pricing, and requires only a showing of "threatened" loss or damage, an injury of the type the antitrust laws were designed to prevent, and that flows from that which makes defendants' acts unlawful. Cargill at 111, 113. Also, see *R. C. Bigelow, Inc. v. Unilever N.V.*, 867 F.2d 102, 108, 1989 U.S. App. Lexis 574 1989-1 Trade Cas. (CCH) ¶68,398 (2d Cir. 1989), *cert. denied*, 493 U.S. 815, 110 S. Ct. 64.

The issue of whether AMI had sufficient evidence to avoid summary judgment as to AMI's Section 3 Clayton Act claim, an important area of antitrust enforcement, should be reviewed by the Supreme Court as a matter falling within the supervisory role in Supreme Court Rule 10.1(a) ("call for an exercise of this Court's power of supervision") and 10.1(c) ("decided a federal question in a way in conflict with applicable decisions of this Court").

V.

HASBRO'S ACTIVITIES ARE PREDATORY AND AMOUNT TO ACTIONABLE MONOPOLIZING AND LEVERAGING UNDER § 2 OF THE SHERMAN ACT

Hasbro has succeeded in excluding its rivals, including AMI, on some basis other than efficiency, and Hasbro's activities are "predatory" and "exclusionary". *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 2859, 1985 U.S. Dist. Lexis 115, 86 L. Ed. 2d 467, 1985-2 Trade Cas. (CCH) ¶66,653 (1985). In *Aspen*, the Court stated in relevant part:

> In addition, it is relevant to consider its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way. n32 If a firm has been "attempting to exclude rivals on some basis other than efficiency," ... it is fair to characterize its behavior as predatory.
>
> n32. "Thus, 'exclusionary' comprehends at the most behavior that not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way." 3 P. Areeda & D. Turner, Antitrust Law 78 (1978).

The threat of losing the year-end market-share rebate is the imposition of higher costs on a competitor. This is anticompetitive conduct. *Wilk v. American Medical Association*, 895 F.2d 352, 1990 U.S. App. Lexis 1931, 1990-1 Trade Cas. (CCH) ¶68,917 (7th Cir. 1990), *cert. denied*, 496 U.S. 927, 110 S. Ct. 2621, and Hasbro's activities are unlawful leveraging, *Grand Light & Supply Co. v. Honeywell, Inc.*, 771 F.2d 672, 681, 1985 U.S. App. Lexis 23052, 41 U.C.C. Rep. Serv. (Callaghan) 1610 (2d Cir. 1985).

This point of law should be granted supervisory review under Supreme Court Rule 10.1(a,c), for reasons given above.

VI.

HASBRO'S "PARTNERSHIP" ARRANGEMENTS WITH THE 10 TOP RETAILERS ARE CONTRACTS, A COMBINATION OR CONSPIRACY IN UNREASONABLE RESTRAINT OF TRADE UNDER §§ 1-2 OF THE SHERMAN ACT AND AN UNLAWFUL TYING ARRANGEMENT UNDER § 3 OF THE CLAYTON ACT

The activities of monopolist Hasbro amount to a de facto vertical integration of 80% (and market domination) of the retail market for games, including family board games, and amounts to a contract (or contracts), combination or conspiracy in unreasonable restraint of trade, in violation of § 1 of the Sherman Act. *Discon, Inc. v. NYNEX Corp.*, 93 F.3d 1055, 1060, 1996 U.S. App. Lexis 21948, 1996-2 Trade Cas. (CCH) ¶71,535, *as corrected by* 1996 U.S. App. Lexis 28747 (2d Cir. 1996). This de facto vertical arrangement with supposedly independent mass retailers is an end run around an (assumedly) prohibited acquisition by Hasbro of these retailers who account for 80% of the retail market for games.

Monopolist Hasbro's activities with the top 10 retailers (having an 80% share of the retail market) amount to a sale of games by Hasbro to them on the condition, agreement, or understanding that the purchaser thereof shall not use or deal in the goods, [or] merchandise or other commodities of a competitor or competitors of the seller, where the effect of such sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce in violation of § 3 of the Clayton Act, 15 U.S.C. § 18 and §§ 1-2 of the Sherman Act, 15 U.S.C. §§ 1-2. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 104 S. Ct. 1551, 1984 U.S. Lexis 49, 80 L. Ed. 2d 2, 1984-1 Trade Cas. (CCH) ¶65,908 (1984); and *Times-Picayune Publ. Co. v. United States*, 345 U.S. 594, 73 S. Ct. 872, 1953 U.S. Lexis 2716, 97 L. Ed. 1277 (1953).

The effect of the tying arrangement is shown by TRU's unwillingness to buy standard games from other manufacturers at

prices substantially less than the high prices being charged by Hasbro; by the bundled volume discounts which give discounts on non-monopolized products as a result of purchases of monopolized products; Hasbro's ability to tell TRU and others to take competing games off their retail shelves, followed by TRU's compliance; Wal-Mart's claim that it has an adequate vendor base and will not buy from any others (especially since games are not interchangeable commodities); and the additional discounts, rebates and allowances paid by Hasbro to TRU and the other top 10 retailers as their compensation for not buying from competing manufacturers, with some exceptions.

White and White, Inc. v. American Hosp. Supply Corp., 540 F. Supp. 951, 1002, 1982 U.S. Dist. Lexis 11906, 1982-1 Trade Cas. (CCH) ¶64,722 (W. D. MI, South. Div.), *rev. on oth. grounds*, 723 F.2d 495 (6th Cir. 1983), *en banc reh. denied*, involving remarkably similar year-end market-share rebates were declared predatory, but reversed for absence of market power of the manufacturer. Also, see *Smithkline Corp. v. Eli Lilly and Co.*, 575 F.2d 1056, 1978 U.S. App. Lexis 11880, 1978-1 Trade Cas. (CCH) ¶62,007 (3d Cir. 1978), *cert. denied*, 439 U.S. 838; and *Ortho Diagnostic*, *supra*, at 920 F. Supp. 468.

This point of law should be granted supervisory review under Supreme Court Rule 10.1(a,c), for reasons given above.

VII.

ANTI-MONOPOLY HAS PROVEN ANTITRUST INJURY

Hasbro's practices are secret, exclusionary, and have the unquestioned effect of encouraging retailers not to deal with competing manufacturers unless they have to. *Eastman Kodak Company v. Image Technical Services, Inc.*, 504 U.S. 451, 473-477, 112 S. Ct. 2072, 1992 U.S. Lexis 3405, 119 L. Ed. 2d 265, 1992-1 Trade Cas. (CCH) ¶69,839 (1992) (non-disclosure of relevant information is predatory conduct). TRU admits that it buy from Hasbro re-

gardless of price. For example, TRU pays substantially higher prices to Hasbro for generic games, and does not buy such games from competing manufacturers at lower prices which are available. The classic theory of lower prices to consumers doesn't work with Hasbro's new business structure. Hasbro has in substance integrated into its customers businesses to the extent of 80% of the retail market, thereby joining Hasbro's monopoly at the manufacturing level with the mass retailers' collective monopoly at the retail level. To protect the top mass retailers from price competition, Hasbro refuses to sell to buying clubs which undersell the mass retailers, and charges more to small retailers, and at the end of year divides up its monopolist profits with the mass retailers through deductions (forgiveness of a significant part of their unpaid invoices). In return, predictably, the mass retailers shelter their partner Hasbro from knock-offs by taking TUMBLING TOWERS off TRU's shelves at Hasbro's direct order, and by not buying other "knock offs" (a term used by Hasbro) (i.e., the ANTI-MONOPOLY game) or by buying from small retailers. In fact, they have no incentive to do so unless there is some compelling business reason (such as an order from a customer, or because of a runaway best seller, which is not apt to occur after Hasbro achieved market power). Hasbro pays them an additional discount for not buying from Hasbro's competitors, an illegal volume discount which impacts adversely on all competitors of Hasbro.

In conclusion, Hasbro's practices are predatory and must be enjoined if the industry is not going to wind up 100% in the hands of Hasbro and its mass retailer partners.

This point of law should be granted supervisory review under Supreme Court Rule 10.1(a,c), for reasons given above.

CONCLUSION

For the foregoing reasons, a writ of certiorari should be granted and the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT DECIDED DECEMBER 2, 1997

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Docket No. 97-7545

ANTI-MONOPOLY, INC.,

Plaintiff-Appellant,

v.

HASBRO, INC.,

Defendant-Appellee,

TOYS "R" US, INC. and K-MART CORPORATION,

Defendants.

130 F.3d 1101; 1997 U.S. App. LEXIS 33867; 1997-2 Trade Cas. (CCH) P71, 989

November 17, 1997, Argued

December 2, 1997, Decided

Appendix A

JUDGES: Before: KEARSE and CARDAMONE, Circuit Judges, and LEISURE, District Judge*.

* * *

OPINION: Per Curiam:

Plaintiff Anti-Monopoly, Inc., appeals from a final judgment entered in the United States District Court for the Southern District of New York, Lawrence M. McKenna, Judge, dismissing its antitrust complaint against defendant Hasbro, Inc. The district court granted judgment on the pleadings dismissing so much of the complaint as asserted a secondary-line violation of the Robinson-Patman Act, 15 U.S.C. § 13, on the ground that plaintiff lacked standing to assert such claims. The court granted summary judgment dismissing the remainder of the complaint, which principally asserted claims under sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2, and sections 3 and 7 of the Clayton Act, 15 U.S.C. §§ 14, 18, on the grounds, inter alia, that plaintiff failed to present evidence sufficient to permit a rational factfinder to infer that plaintiff suffered "antitrust injury."

We have considered all of plaintiff's challenges to the district court's rulings and have found in them no basis for reversal. We affirm substantially for the reasons stated in Judge McKenna's Memorandum and Order, reported at 958 F. Supp. 895 (1997).

The judgment of the district court is affirmed.

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* Honorable Peter K. Leisure, of the United States District Court for the Southern District of New York, sitting by designation.

APPENDIX B — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED MARCH 31, 1997

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

94 Civ. 2120 (LMM)

ANTI-MONOPOLY, INC.,

Plaintiff,

- against -

HASBRO, INC., TOYS "R" US, INC. and
K MART CORPORATION,

Defendants.

958 F. Supp. 895; 1997 U.S. Dist. LEXIS 3775; 1997-1 Trade Cas. (CCH) P71, 849

March 26, 1997, Decided

March 31, 1997, FILED

* * *

JUDGES: LAWRENCE M. McKENNA, U.S.D.J.

OPINION BY: LAWRENCE M. McKENNA

OPINION: MEMORANDUM AND ORDER

Appendix B

MCKENNA, D.J.

Family board game manufacturer Anti-Monopoly, Inc. ("AMI") commenced this antitrust action against its competitor, Hasbro, Inc. ("Hasbro"), alleging, among other things, violations of §§ 1 and 2 of the Sherman Act, §§ 3 and 7 of the Clayton Act, the Robinson-Patman Act, and state law.[1] Hasbro moves for summary judgment, pursuant to Rule 56 of the Federal Rules of Civil Procedure, to dismiss AMI's Second Amended Complaint. Hasbro also moves for partial judgment on the pleadings to dismiss AMI's secondary-line Robinson-Patman Act claims.[2] For the reasons set forth below, Hasbro's motions are granted and AMI's Second Amended Complaint is dismissed in its entirety. The other motions pending before the Court are either disposed of in this Memorandum and Order or are dismissed as moot.[3]

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1. Toys "R" Us, Inc. ("TRU") and K Mart Corporation ("Kmart") have settled their dispute with AMI and are no longer defendants in the action. AMI alleged other violations of the antitrust laws that were dismissed in an earlier Memorandum and Order of the Court. See Anti-Monopoly, Inc. v. Hasbro, Inc., 1995 U.S. Dist. LEXIS 16355, 1995 WL 380300 (S.D.N.Y. 1995).

2. Prior to the completion of discovery, Magistrate Judge Peck, who oversaw discovery in this action, stayed AMI's apparently onerous discovery requests relating to AMI's secondary-line Robinson-Patman Act claims to allow Hasbro to move before this Court for judgment on the pleadings to dismiss those claims. See Opinion and Order of Magistrate Judge Peck, dated March 6, 1996. Because the Court grants Hasbro's motion, the issue of discovery relating to those claims is now moot. The remainder of discovery is complete.

3. In addition to the above motions, AMI moves for summary judgment as to liability on certain of its antitrust claims and Hasbro

(Cont'd)

Appendix B

I. Factual Background

A. The Rise and Fall of Anti-Monopoly

In 1973, AMI introduced Anti-Monopoly into the marketplace, a board game in which "players broke up monopolies by bringing antitrust suits against monopolists." (Anspach Decl., 7-15-96, PP 1, 16.) AMI sold over 400,000 Anti-Monopoly games in the United States between 1973 and 1976, despite the concession of AMI's founder and president, Ralph Anspach, that the subject matter of the game was not well understood by the public. (Id. at PP 16, 16a; Person Decl., 7-15-96, Ex. C6.)

In 1976, AMI was temporarily enjoined from using the word "Monopoly" in the title of its game on the ground that it infringed the mark owned by Parker Brothers for its popular board game, Monopoly.[4] In 1982, the Ninth Circuit Court of Appeals concluded that the word "Monopoly" as applied to board games had become generic and invalidated Parker Brothers' trademark registration. Anti-Monopoly v. General Mills Fun Group, Inc., 684 F.2d 1316, 1326 (9th Cir. 1982), cert. denied, 459 U.S. 1227, 103 S. Ct. 1234, 75 L. Ed. 2d 468 (1983). During the period of the injunction, AMI continued to sell Anti-Monopoly under a different name.

(Cont'd)
moves for sanctions claiming that AMI's motion is frivolous. Because the Court grants Hasbro's motion dismissing AMI's Second Amended Complaint in its entirety, AMI's motion is denied. Hasbro's motion for sanctions is also denied.

4. For a brief history of the board game Monopoly and the trademark litigation, see Anti-Monopoly v. General Mills Fun Group, 611 F.2d 296, 299-300 (9th Cir. 1979).

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In 1977, before the Ninth Circuit's decision was rendered, AMI introduced a second board game, which Anspach describes as an "upgrade" of the board game Monopoly. (Anspach Decl., 7-15-96, P 16b.). Precluded from using "Monopoly" in the board game's title, AMI called the game "Choice." (Id.) In 1983, after Parker Brothers' trademark was invalidated and the injunction against using "Monopoly" was lifted, AMI changed the name of Choice to Anti-Monopoly II. (Id. at P 16c.) In 1987, believing that consumer confusion between Anti-Monopoly and Anti-Monopoly II was harming sales of the latter, "completely different," game, Anspach caused AMI to cease the production of the original game and remove the "II" from the name of the latter game. (Id. at P 17; Person Decl., 7-15-96, Ex. C6.) It is sales of the second Anti-Monopoly game which AMI claims have been harmed by Hasbro's allegedly anticompetitive conduct.[5]

According to AMI's records, Choice sold 2,557 units in the United States in 1980 and 1,939 units in 1981. After Choice's name was changed to Anti-Monopoly II, the game's United States sales increased from 1,416 units in 1983 to 12,648 units in 1986 to its peak of 42,218 units in 1989. (Person Decl., 7-15-96, Ex. C6.) In 1990, the year Anti-Monopoly (formerly Anti-Monopoly II) was dropped by the mass retailers, including TRU and Kmart, AMI sold only 3,400 units of Anti-Monopoly, and has since not sold more than 3,000 units in any year. (Id.; Anspach Decl., 7-15-96, P 51.) TRU and Kmart stopped selling Anti-Monopoly because, in the opinion of their game buyers, it lacked consumer appeal. (Boyle Decl. P 2; Christensen Decl. P 5.) In 1995, the most recent statistic available, AMI sold only 460 units of Anti-Monopoly in the United States.

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5. AMI also produces a third board game, Star Peace.

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Parker Brothers, presently a subsidiary of Hasbro, bought the trademark to Anti-Monopoly, and licensed it back to AMI. (See Person Decl., 7-15-96, Ex. Q5.) After AMI's prior distributorship agreement with Elite Games Group expired, AMI approached Hasbro with a "proposition" for Hasbro to market Anti-Monopoly through its subsidiary, Milton Bradley, which Hasbro refused. (Anspach Decl., 7-15-96, PP 57, 59-60.) Perhaps the explanation for this lawsuit is Hasbro's refusal to market Anti-Monopoly. Anspach claims that "the present market share (and power) of Hasbro gives it a better chance of success than if a board game were marketed by another manufacturer. Accordingly, from a business standpoint, there is an element of guarantee inherent in Hasbro's monopolistic position." (Id. at P 48.) After Hasbro rejected AMI's "proposition," AMI commenced this antitrust action. (Id. at P 60.)

B. The Board Game Industry

A picture of the board game industry in the United States is difficult to discern from the parties' papers. AMI's papers are replete with conclusory statements and lack organization and coherence. Hasbro's papers, in contrast, strategically omit any comprehensive discussion of the board game industry apparently because Hasbro contends that the relevant market in this case consists of portions of the "toy and game" industry in which Hasbro's market share is far more limited. Despite this difficulty, for the purposes of the instant motions, the Court is able to conclude the following when the facts are viewed in the light most favorable to AMI.

Hasbro possesses approximately 70% of the games and puzzles market, which constitutes approximately 14% of the total toy industry. (Person Decl., 7-15-96, Ex. L2.) Family

board games, the putative relevant market in this case, is a subset of those products included in the games and puzzles market.

AMI defines family board games as "non-strategy board games, in which players move tokens on a board surface, and the games are suitable for players at least 7-8 years old and are targeted for group play which does not exclude the 7 or 8 to 18 year age group." (Second Am. Compl. PP 12, 15.) AMI has not supplied facts to show that the market statistics on which it relies are based on this narrow definition. The president of NPD Group, Inc. ("NPD"), which compiled the market data, confirmed that NPD "provides no formal definitions for the categories contained in its reports." (Roth Decl. P 5.) Because Hasbro's own documents relate its large share of the non-electronic game industry, and because the Court can resolve the pending motions without defining the precise contours of the relevant market, the Court will assume for the purposes of the instant motions that family board games refer to a discrete class of products.[6]

According to a toy industry report, five mass retailers — TRU, Wal-Mart, Kmart, Target, and Kay Bee/Toy Works — accounted for more than 50% of the dollar sales in the toy and game industry in 1994. TRU possessed the largest retail share of toy and game sales with approximately 20% of 1994 sales. (Harrington Decl. Ex. 13, at 23; Ordover Decl., 6-12-96, PP

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6. In addition, AMI proposes a relevant submarket, which it coins "monopoly-type family board games" and defines as "family board games based on some of the monopolistic features of real estate and/or public utilities, including the payment of rents to owners or users thereof." (Second Am. Compl. P 12.) Because AMI has failed to provide factual support for this alleged submarket, the Court will not consider it.

45-49; see also Anspach Decl., 2-28-96, P 13.) Regarding games, the record indicates that Hasbro "owns" almost 55% of the items sold in Kmart and TRU, and over 70% of the items sold in Wal-Mart and Target. The percentage of Hasbro games sold in Kay Bee/Toy Works is not apparent from the record.

Hasbro, which includes such well-known manufacturers as Milton Bradley and Parker Brothers, is the dominant producer of family board games in the United States based on NPD-compiled statistics. Some of the historically more popular board games distributed by Hasbro include: Monopoly, Life, Risk, Scrabble, Outburst, Pictionary, and Trivial Pursuit. (See Hasbro, Inc. 1994 Annual Report, Harrington Decl. Ex. 5.) NPD statistics indicate that Hasbro sells 70.3 percent of the family board games sold in the United States, and sold the five best-selling games in the first half of 1993. (Person Decl., 7-15-96, Exs. 12 & B6.) As of June 1993, Tyco was apparently the next largest family board game manufacturer in the United States with less than 10 percent of the market. (Id. Ex. 12). Other market participants include Pressman Games and a number of smaller manufacturers.

The parties agree that it is neither difficult nor expensive to manufacture a new board game, but disagree as to whether it is easy to enter the board game market. (Second Am. Compl. P 15(D); Harrington Decl. Ex. 6, at 2; Orbanes Decl. P 26; Wilson Decl. P 4.) Hasbro concedes that the mere ability to manufacture a board game does not guaranty its success. Of 42 games introduced by Parker Brothers and Milton Bradley in 1991 only 21 were still being offered for sale by 1994. (Orbanes Decl. P 31.) Moreover, board games sold by the mass merchants are much more likely to garner large volumes of sales in the short term than those sold only in regional department stores or individual toy and game stores.

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An independent manufacturer has a number of choices when it decides to introduce a new game. The most common method is to license the game to one of the major manufacturers, such as Hasbro. (Hersch Decl. P 6.) An independent manufacturer may also choose to market its game directly to retailers, bearing the attendant costs and risks. (Hersch Decl. P 7.) The mass retailers are less likely to accept a game for sale if it doesn't promise substantial sales in a short period of time. (Orbanes Decl. P 26; Christensen Decl. P 2.) This reluctance makes it more difficult for smaller manufacturers, with less capital for national advertising, to place their games in the mass retailers. However, a manufacturer can successfully launch a game through smaller retail stores, such as local department stores and independent game stores. Examples of games that achieved national success by first approaching smaller retail stores include Pictionary, Scruples, and Mindtrap. (Orbanes Decl. P 27.)

C. Hasbro's Purported Anti-Competitive Acts

AMI's various antitrust claims are premised on the same facts, which the Court concludes fall into two general categories.[7] First AMI claims that certain Hasbro discounts and promotions

7. In addition to the facts based on deposition testimony and sworn declarations, AMI has submitted purported expert opinions based on a long litany of "assumed" facts, which were prepared by AMI's counsel. (See Person Decl. Exs. C, D, E, F, G, I.) In these assumed facts, AMI asked its experts to accept as true, among other things: (1) AMI's alleged market definition; (2) the allegations of Hasbro's illegal pricing practices and their anticompetitive effects contained in AMI's complaint; (3) the "fact" that Hasbro's prices are predatory; and (4) the "fact" that Hasbro and TRU conspired to refuse to deal with Anti-Monopoly in exchange for discriminatory discounts. Needless to say, the Court does not accept these unsupported and assumed facts as true for the purposes of the instant motions.

available to mass retailers, such as TRU, are purportedly not available to smaller retailers, and are thus discriminatory. Second, AMI claims that certain Hasbro practices, including volume discounts that benefit the mass retailers, discourage those retailers from purchasing non-Hasbro games, such as Anti-Monopoly, and thus harm competition. Much of AMI's alleged evidence focuses on innuendo based on communications between Hasbro and TRU, and/or vague inferences from ambiguous documents and testimony.

1. Retailer Discrimination

AMI claims that Hasbro discriminates against smaller retailers in favor of the mass retailers, such as TRU. According to AMI, it is harmed by this discrimination because smaller retailers cannot compete with the mass retailers, which causes them to go out of business and provides fewer stores in which to sell Anti-Monopoly.

The nature of this alleged discrimination includes offering the mass retailers promotional and advertising discounts of which smaller retailers are unaware (see, e.g. Person Decl., 7-15-96, Exs. M3, U3, I4, J4; Person Decl., 3-1-96, PP 5-7, 11-19; Canfield Decl. PP 3-12; Goldstein Decl. PP 4-12); supplying only the mass retailers with personnel to stock their shelves (Hall Dep. 150-54; see also Person Decl., 4-5-96, Ex. AA; Goldstein Decl., 2-15-96, P 11); and providing the mass retailers with a preview of Hasbro's product line before it is introduced to the other retailers (see Hall Dep. 38-45; Canfield Dep., 1-4-96, PP 13, 15-16).

Although AMI has supplied the Court with numerous documents referring to Hasbro discounts or promotions, the

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Court notes that AMI has failed to provide context to the documents by explaining the nature or conditions of the discounts. Thus, although AMI claims that Hasbro's discounts are discriminatory, it is difficult for the Court to conclude that they are, based on the inadequate information before it. However, some small retailers have indicated in sworn declarations that discounts available to the mass retailers are not available to them. Liberally construing the evidence in AMI's favor, the Court will assume for the purposes of the instant motions that some of Hasbro's discounts and promotions discriminate against smaller retailers in favor of the mass retailers.

2. Other Hasbro Practices

In addition to Hasbro's allegedly discriminatory policies outlined above, AMI complains about a number of other Hasbro practices. AMI claims that Hasbro refuses to sell only its "hot" games to retailers, instead conditioning the sale of such "hot" items on the purchase of more poorly performing items. (Hosea Dep. 89-92; Wilson Dep. 73.) According to E. David Wilson, president of Hasbro's Games Group, allowing a retailer to purchase only the "cream of the crop" would be "harmful for our business." (Wilson Dep. 72.)

AMI also claims that Hasbro has conspired with certain mass retailers to fix the prices of Hasbro's board games by negotiating TRU's profit margin. (Person Decl., 3-1-96, P 3, Person Decl., 4-5-96, PP 11-13, 22.) AMI's alleged evidence of this price fixing scheme includes the testimony of Jill Hall, a board game buyer for TRU. According to Hall, TRU approaches Hasbro when TRU has excess inventory of games in order to negotiate a markdown, or discount price, which allows TRU to sell its remaining inventory on the unpopular product at a lower

price while still turning a profit. (Hall Dep. 73-75, 218-21.) Although some smaller board game manufacturers did not receive similar markdowns from Hasbro for their remaining inventories, apparently some did. (See Canfield Decl., 1-4-96, P 3; Person Decl., 4-5-96, Exs. S, U, & V.) Other than these negotiated markdowns, there is no evidence suggesting that TRU and Hasbro negotiated TRU's profit margins. Hasbro was apparently aware of TRU's profit margins, however, because it notified TRU that it thought TRU's prices were too high in correspondence referring to those profit margins. (Personal Decl., 4-5-96, Ex. BB.)

AMI also complains about Hasbro's volume discounts on the ground that they discourage the mass retailers from purchasing Anti-Monopoly. (See Person Decl., 3-1-96, P 5; Person Decl., 3-1-96, Exs. E, M.) The percentage of Hasbro's volume discount increases as the quantity of Hasbro items purchased increases. AMI offers a hypothetical example to explain how it has been harmed by Hasbro's volume discounts. TRU, AMI theoretically explains, forgoes the purchase of Anti-Monopoly for fear that profitable sales of Anti-Monopoly will cut into TRU's sales of Hasbro products, which will reduce the percentage of TRU's volume discount. Because, according to AMI, the loss of even a small percentage increase in volume discount on the entire line of Hasbro's products carried by TRU far exceeds TRU's potential profit on Anti-Monopoly, it would not make economic sense for TRU to carry Anti-Monopoly. (Person Decl., 3-1-96, P 5.) For similar reasons, AMI claims that a number of Hasbro discounts are anticompetitive. (See Person Decl., 3-1-96, PP 12-17; Person Decl., 4-5-96, PP 30-38.) AMI has provided no factual support for its theory.

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II. Discussion

A. Standard of Review

Summary judgment should be granted only where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. Proc. 56(c); Celotex Corp. v. Catrett, 477 U.S. 317, 322, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986). All facts, inferences, and ambiguities must be viewed in a light most favorable to the non-movant. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). "The mere existence of some alleged factual dispute . . . will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no genuine issue of material fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48, 91 L. Ed. 2d 202, 106 S. Ct. 2505 (1986).

B. Market Power

Although market power is not an essential element of all of AMI's claims — see K.M.B. Warehouse Dist., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995) (market power is not a prerequisite to all § 1 Sherman Act claims) — to sustain most of its claims, AMI must show that Hasbro possesses market power in the putative relevant market, family board games. Market power is "the ability to raise price significantly higher than the competitive level by restricting output." Ball Memorial Hospital, Inc. v. Mutual Hospital Ins., Inc., 784 F.2d 1325, 1331 (7th Cir. 1988) (Easterbrook, J.); see also Phillip E. Areeda

et at., Antitrust Law, Volume IIA, P 501 (1995) [hereinafter "Antitrust Law"]. Market share is frequently reflective of market power, and thus a showing that a defendant possesses a large share of a well-defined market is usually sufficient to demonstrate market power. See K.M.B. Warehouse, 61 F.3d at 129 ("market share may be a proxy for market power"); Eastman Kodak Co. v. Image Technical Services, Inc., 504 U.S. 451, 452, 119 L. Ed. 2d 265, 112 S. Ct. 2072 (1992) (Kodak's possession of "nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes," was sufficient to withstand Kodak's summary judgment motion).

1. Market Definition

The relevant inquiry for market definition is whether a hypothetical union of all producers of the product or products in the putative market would possess significant power over price. If so, then the product or products comprise a relevant market. See Antitrust Law, Volume IIA P 533c; Department of Justice and Federal Trade Commission, Horizontal Merger Guidelines, at 10-11 (April 2, 1992). In the instant case, the question is whether a hypothetical union of all producers of family board games would possess significant power over the price of family board games. If so, then family board games is the relevant market. If a hypothetical union of all producers of family board games would not possess significant power over price, that is, if consumers would purchase alternate products rather that pay the inflated price for family board games, then family board games defines the market too narrowly. The products to which the consumer would turn in light of the more expensive games would also be part of the relevant market.

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The Supreme Court has recognized that "the relevant market for antitrust purposes is determined by the choices available" to the consumer. Kodak, 504 U.S. at 481-82 (citing Jefferson Parish, 466 U.S. 2 at 19); Brown Shoe Co. v. United States, 370 U.S. 294, 325, 8 L. Ed. 2d 510, 82 S. Ct. 1502 (1962). The Court set the standard for market definition in United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956). "No more definite rule can be declared than that commodities reasonably interchangeable by consumers for the same purposes make up that 'part of the trade or commerce', monopolization of which may be illegal." Id. at 395.

In the instant case, the parties have submitted various analyses to support their respective definitions of the relevant market. The reason is clear. If family board games were accepted as the relevant market, then, because there is some evidence that Hasbro possesses approximately 70% of that putative market, Hasbro's market share would evidence market power. In contrast, if Hasbro were correct that family board games compete with a "cluster" of toys and games, then the relevant market would include products manufactured by toy powerhouse Mattel, Inc., among others, and Hasbro's share of the relevant market, according to Hasbro's expert, would be less than 25%, too low to evidence market power. See Ortho Diagnostic Systems, Inc. v. Abbott Laboratories, Inc., 920 F. Supp. 455, 473-74 (S.D.N.Y. 1996) (citing Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 80 L. Ed. 2d 2, 104 S. Ct. 1551 (1984)).

To satisfy its burden relating to market definition, AMI has submitted the expert declarations and cross-elasticity reports of Ralph Anspach, AMI's president, and that of economist

C. Daniel Vencill.[8] In these reports, Anspach and Vencill conclude, based on their respective analyses of NPD data, that family board games comprise a relevant antitrust market because they have "low interchangeability with other games such as adult games, puzzle games, standard games, family action games, and strategy games." (Vencill Report, 7-14-96, at 4; Anspach Decl., 7-15-96, at P 66.) Hasbro's expert, Janusz A. Ordover, finds numerous computational and conceptual flaws with AMI's experts' analyses, leading him to comment that they "would receive a failing grade if submitted by a graduate student in my industrial organization classes at NYU." (Ordover Report, 8-7-96, at P 1.) Ordover's analysis concludes that the relevant market consists of toy and game "clusters," which are based on the price of the item and certain demographic characteristics of the intended user.

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8. Hasbro objects to these documents on two grounds: (1) they violate Rule 26 because they were first submitted in response to Hasbro's summary judgment motion; (2) Magistrate Judge Peck precluded Vencill and Anspach from offering any opinions in this case other than those based on the assumed facts they relied on in their initial Rule 26(a) (2) expert reports. (Hasbro Reply Mem. 8-9.)

Hasbro is simply incorrect that AMI's expert submissions violate Magistrate Judge Peck's order. The substance of that order was to preclude AMI's experts from using certain information produced by Hasbro to supplement their expert analyses. (Harrington Decl. Ex. 1, at 26-29.) However, the Vencill and Anspach declarations explicitly indicate that they are based on independently acquired information; not information produced by Hasbro. (Vencill Decl., 7-14-96, P 14; Anspach Decl., 7-15-96, P 13.) While Hasbro may be correct that these expert analyses violate Rule 26, Hasbro has not shown that it is prejudiced by their submission because it admittedly possessed the information upon which AMI relied for its own reports.

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2. Barriers To Entry

Even were AMI's market definition accepted for the purposes of the instant motions, large market share is not dispositive of a determination of market power. "Market power comes from the ability to cut back the market's total output and so raise price." Ball Memorial Hospital, 784 F.2d at 1335. In other words, even if family board games constituted the relevant market, and even if Hasbro possessed 70% of that market, Hasbro would not have market power if it could not significantly raise price by restricting output.

Where barriers to entry into the relevant market are low, a defendant's large market share may not accurately reflect market power. See United States v. Waste Management., Inc. 743 F.2d 976, 983 (2d Cir. 1984); Ball Memorial, 784 F.2d at 1335. In Waste Management, the government challenged the acquisition by Waste Management, Inc. ("WMI"), a solid waste disposal company, of a competitor in the Dallas area. If allowed, the merger would have resulted in WMI controlling 48.8% of a certain category of the waste disposal business in the Dallas area, sufficient to constitute prima facie evidence that the merger was illegal. Waste Management, 743 F.2d at 976. Declining to find that the merged company would possess market power, the Second Circuit recognized that "entry into the relevant product and geographic market by new firms or by existing firms in the Fort Worth area is so easy that any anti-competitive effect of the merger before us would be eliminated more quickly by such competition than by litigation." Id. at 983; see also Antitrust Law, Volume IIA, Section 4C.

Hasbro, relying on recent market participants, claims that barriers to entry into the family board game market are low,

precluding a finding that it has market power. Hasbro points out that a common trade magazine publishes the names of companies and individuals who can assist in the development, production, and marketing of a new game, indicating that even a manufacturer with little experience in the industry could introduce a game. (Orbanes Decl. P 26.) In addition, the president of Hasbro's Games Group, E. David Wilson, claims, and AMI does not dispute, that most successful games in recent years were introduced by small independent game manufacturers. (Wilson Decl., 6-12-96, PP 3-4.) Wilson cites as examples, Mindtrap, Advertising, Where in the World is Carmen San Diego?, Brain Quest, Pictionary, and Trivial Pursuit. (Id.; see also Angel Decl. PP 5-9 (development of Pictionary); Hesch Decl. P 8 (development of Out of Context); Ware Decl. PP 3-13 (development of Trivial Pursuit).)[9]

9. Hasbro also claims that the nature of the competition among toy and game retailers negates a finding of market power. Hasbro explains that the top five retailers in the toy and game industry in the United States sell approximately 50% of all toys and games. TRU, the largest of these retailers, sells approximately 20% of all toys and games. (Harrington Decl. Ex. 13.) According to Hasbro, TRU is so powerful that the Federal Trade Commission ("FTC") claims TRU was able to stop Hasbro from selling its products to various customers, including warehouse clubs. (Hasbro Mem. 8; Harrington Decl. Ex. 14, PP 4-7.)

The record does not allow the Court to draw the inferences necessary to conclude that competition in the retail business for games restricts Hasbro's ability to control prices in the putative family board game market. First, Hasbro cites to information for the broader toy and game industry. Thus, the record does not sufficiently establish who the retail players are in the family board game market nor their effect on Hasbro. Second, even if the FTC complaint upon which Hasbro relies for its claim, were sufficient to show that TRU was able to restrain the quantity of Hasbro sales to TRU's retail competitors — which it is not — it still would not show that TRU sufficiently restrains Hasbro's ability to control prices on the games sold to TRU or other retailers.

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AMI does not refute Hasbro's historical data, but contends in conclusory fashion that "the current board game market is rigged against potential non-Hasbro-developed staples getting a foothold in the market. Therefore, the frequency of success of new games becoming staples cannot be determined on the basis of past history." (Anspach Decl., 7-15-96, at P 45). It further claims that a successful competitor must be able to place its games in the mass retailers, which requires substantial capital investment for marketing and advertising. (AMI Oppos. Mem. 10; Second Am. Compl. P 15(D); Harrington Decl. Ex. 6, at 2; Anspach Decl., 7-15-96, PP 32-33.) AMI also points out that the attendant risk associated with introducing a new game discourages new entrants.

The Court notes that AMI's evidence relating to barriers to entry is nonspecific and largely speculative, while Hasbro's evidence is based on actual market participants. Unrebutted evidence that actual competitors have entered the market is a strong indicator that Hasbro lacks market power. See Antitrust Law, Volume IIA, PP 420b, 422c. This follows because these new entrants provide a check on Hasbro's ability to charge monopoly prices or otherwise exercise market power. In the face of Hasbro's evidence that most of the recent, successful board games have been introduced by small, independent game manufacturers, AMI has failed to set forth facts to show that barriers to entry into the putative family board game market are high.

Nevertheless, the Court need not resolve the pending motions by finding that Hasbro lacks market power in the relevant market, which in any event is usually a question of fact, not law. Sunshine Cellular v. Vanguard Cellular Sys., 810 F. Supp. 486, 493 (S.D.N.Y. 1992) (citing Jennings Oil Co. v.

Mobil Oil Corp., 539 F. Supp. 1349, 1352 (S.D.N.Y. 1982)). Indeed, experts are not always essential to defining the relevant market. See United States v. Pabst Brewing Co., 384 U.S. 546, 549, 16 L. Ed. 2d 765, 86 S. Ct. 1665 (1966) (government need not prove "by an army of expert witnesses what constitutes a relevant 'economic' or 'geographic' market"). Thus, the Court assumes, for the purposes of the instant motions, that Hasbro has market power in the family board game market.

C. Antitrust Standing

To recover damages under § 4 of the Clayton Act an antitrust plaintiff must show that it has antitrust standing. Associated General Contractors of California, Inc. v. California State Council of Carpenters, 459 U.S. 519, 74 L. Ed. 2d 723, 103 S. Ct. 897 (1983). To determine whether AMI has antitrust standing, the Court must "evaluate the plaintiff's harm, the alleged wrongdoing by the defendants, and the relationship between them." Id. at 535. In Associated General, the Supreme Court recognized a number of factors relevant to a determination of antitrust standing, including the nature of plaintiff's alleged injury. Id. at 538.

1. Alleged Discrimination

AMI has not clearly articulated how it is injured by Hasbro's allegedly discriminatory practices. To the extent that Hasbro charges smaller retailers more for Hasbro games than it charges the mass retailers, AMI is benefitted because it can more easily place Anti-Monopoly in these smaller retailers. To the extent AMI claims that Hasbro charges the mass retailers too little, its claim is simply one for predatory pricing and not for discrimination. (See Anspach Decl., 2-28-96, PP 15-23.)

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AMI's argument appears to rely on the fact that the retail market for family board games is being consolidated by a few mass retailers. Because this consolidation is causing the smaller retailers to go out of business, AMI allegedly cannot succeed by selling to only the smaller retailers. The Court notes that if AMI's theory of injury to small retailers based on Hasbro's allegedly unjustified discriminatory conduct were correct, it is somewhat curious that the small retailers have not instituted an action on their own behalf. Moreover, AMI has not provided factual support for its claim that the purported retailer consolidation is related to the Hasbro practices about which AMI complains.

The Court finds that AMI's theory lacks factual support, and in any event is too indirect, speculative, and tenuous to support antitrust standing. See Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 230-31, 125 L. Ed. 2d 168, 113 S. Ct. 2578 (affirming summary judgment where facts do not support plaintiff's theory); Associated General, 459 U.S. at 545-46 (recognizing that the tenuous and speculative nature of the relationship between alleged antitrust violation and injury, and the existence of more direct victims, weigh heavily against a finding of antitrust standing).[10]

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10. Hasbro correctly points out that, under the Robinson-Patman Act, a secondary-line violation would occur if game retailers, that is, Hasbro's customers, suffered antitrust injury because of Hasbro's alleged price discrimination. See Best Brands Beverage, Inc. v. Falstaff Brewing Corp., 842 F.2d 578, 583-84 (2d Cir. 1987). In contrast, a primary-line injury refers to injury to Hasbro's competitors, such as AMI. Id. AMI does not have antitrust standing to pursue the alleged secondary-line claims of Hasbro's customers. For that reason, Hasbro's motion for judgment on the pleadings to dismiss AMI's secondary-line Robinson-Patman Act claims is granted.

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Because AMI lacks antitrust standing to pursue its discrimination claims, the Court grants Hasbro's motion for summary judgment as to all of AMI's claims to the extent they allege that Hasbro discriminated against smaller retailers in favor of the mass retailers.

2. Pricing Practices

Antitrust injury, a necessary component of antitrust standing, is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489, 50 L. Ed. 2d 701, 97 S. Ct. 690 (1977); Cargill, Inc. v. Monfort of Colorado, Inc., 479 U.S. 104, 110 n.5, 93 L. Ed. 2d 427, 107 S. Ct. 484 (1986). Absent predatory pricing, an antitrust plaintiff cannot complain that its competitor's prices are too low. In Atlantic Richfield, the Court explained:

> When a firm, or even a group of firms adhering to a vertical agreement, lowers prices but maintains them above predatory levels, the business lost by rivals cannot be viewed as an "anticompetitive" consequence of the claimed violation. A firm complaining about the harm it suffers from nonpredatory price competition "is really claiming that it [is] unable to raise prices." . . . This is not antitrust injury; indeed, "cutting prices in order to increase business is the very essence of competition."

Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 337-38, 109 L. Ed. 2d 333, 110 S. Ct. 1884 (1990) (citations omitted).

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To sustain its claim for predatory pricing, AMI must prove (1) that Hasbro's prices are below an appropriate measure of Hasbro's costs; and (2) that Hasbro had a dangerous probability (or a reasonable prospect under the Robinson-Patman Act) of recouping its investment in below-cost prices. Brooke Group, 509 U.S. at 222-24. AMI has not provided factual support for either element of a below-cost pricing antitrust claim. Instead, AMI theorizes that Hasbro can achieve instant recoupment by pricing Monopoly below cost. Hasbro allegedly achieves this instant recoupment when the consumer enters TRU to buy Monopoly, but then decides to buy another Hasbro product. (Anspach Decl., 4-3-96, PP 19, 27-31.) AMI's factually unsupported theory is not sufficient to support a claim. Id. at 230-43.

To the extent that AMI claims that Hasbro's discounts and other promotional allowances cause its prices to be too low, AMI has failed to show that it has suffered antitrust injury. This is true regardless of the statute under which AMI's antitrust claims are based. Atlantic Richfield, 495 U.S. at 340; see also Cargill, 479 U.S. at 116 (holding that plaintiff must show predatory pricing under § 7 of the Clayton Act); Brooke Group, 113 S. Ct. at 2587 (holding that predatory pricing claim under both § 2 of Sherman Act and under the Robinson-Patman Act require plaintiff to show that its competitor's prices are below an appropriate measure of the competitor's costs).

D. Hasbro Has Not Violated the Antitrust Laws

To the extent that AMI might have antitrust standing, it has failed to provide factual support for its allegations of anticompetitive conduct. For example, AMI has failed to support its § 2 claim for conspiracy to monopolize or its § 1 claim

alleging a "contract, combination . . . or conspiracy" in restraint of trade with evidence of concerted action. See Monsanto Co. v. Spray-Rite Service Corp., 465 U.S. 752, 761, 79 L. Ed. 2d 775, 104 S. Ct. 1464 (1984) (recognizing that independent action is not proscribed under § 1); Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988) (recognizing that element of conspiracy to monopolize under § 2 requires concerted action). Concerted action means "a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946).

AMI apparently claims that, because TRU discusses its profit margin with Hasbro when it negotiates certain wholesale discounts, including post-sale markdowns to reduce inventory, there is evidence of concerted action. The Court does not agree. In Monsanto, the Supreme Court recognized that "[a] manufacturer and its distributors have legitimate reasons to exchange information about the prices and the reception of their products in the market." Monsanto Co., 465 U.S. at 762. The Court cautioned against drawing an inference of a price fixing agreement from ambiguous evidence. Id. at 763.

Calling the evidence ambiguous would be generous. AMI has not pointed to any exhibits or non-hearsay testimony to support its claim that Hasbro had an express or implied agreement to fix prices with TRU or any other retailer. A lack of factual support is fatal to AMI's conspiracy claims. See Schwimmer v. Sony Corp. of America, 677 F.2d 946, 953-54 (2d Cir.) (plaintiff failed to introduce sufficient facts from which an inference of agreement to discourage trans-shipping could be drawn), cert. denied, 459 U.S. 1007, 74 L. Ed. 2d 398, 103 S. Ct. 362 (1982).

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The distinct and significant problem with all of AMI's antitrust claims is that they lack factual support in the record. Accordingly, all of AMI's antitrust claims are dismissed.

E. State Law Claim

"When all bases for federal jurisdiction have been eliminated from a case so that only pendent state claims remain, the federal court should ordinarily dismiss the state claims." Baylis v. Marriott Corp., 843 F.2d 658, 665 (2d Cir. 1988) (citing United Mine Workers of America v. Gibbs, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966)). The Court is not convinced that all bases for federal jurisdiction relating to AMI's state law claim have been eliminated. On the face of the complaint it appears that there is complete diversity between AMI and Hasbro, and thus the Court may still have federal jurisdiction over AMI's state law claim. (Second Am. Compl. PP 4, 5.)

In any event, the Court believes that in this case, in which AMI has entirely failed to provide factual support for both its federal and state law claims, allowing AMI to pursue its state law claim in state court would be a waste of the resources expended to resolve the parties' dispute. Discovery is complete, and Hasbro has properly moved for summary judgment to dismiss AMI's one state law claim for tortious interference with business advantage. The Court will also resolve this aspect of Hasbro's motion.

To state a claim for tortious interference with business advantage, "a plaintiff must show (1) business relations with a third party; (2) defendants' interference with those business relations; (3) defendants acted with the sole purpose of harming

the plaintiff or used dishonest, unfair, or improper means; and (4) injury to the relationship." Purgess v. Sharrock, 33 F.3d 134, 141 (2d Cir. 1994). AMI has not set forth any particular business relation with which Hasbro interfered; nor has it set forth any facts that Hasbro intended to harm AMI; nor has it set forth facts to show that Hasbro used dishonest, unfair, or improper methods to compete with AMI. Accordingly, AMI's state law claim is dismissed with prejudice.[11]

III. Conclusion

For the reasons set forth above, Hasbro's motion for summary judgment dismissing AMI's Second Amended Complaint is granted. The Count also grants Hasbro's motion for judgment on the pleadings dismissing AMI's secondary-line Robinson-Patman Act claims. The other pending motions are disposed of in the above Memorandum and Order or are dismissed as moot. The Clerk is directed to enter judgment dismissing the Second Amended Complaint.

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11. The Court also notes that, under New York state law, the failure to provide argument on a point at issue constitutes abandonment of the issue. See Bombard v. Central Hudson Gas & Electric, 205 A.D.2d 1018, 614 N.Y.S.2d 577, 580 (3d Dep't 1994); see also Ortho Pharmaceutical Corp. v. Cosprophar, Inc., 828 F. Supp. 1114, 1129 (S.D.N.Y. 1993) (recognizing that parties failure to address claim raised in adversary's papers may indicate abandonment), aff'd, 32 F.3d 690 (2d Cir. 1994). AMI failed to provide any AMI's state law claim, which provides an independent basis for dismissal.

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SO ORDERED

Dated: New York, New York

March 26, 1997

LAWRENCE M. McKENNA

U.S.D.J.

APPENDIX C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JUNE 27, 1995

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

94 Civ. 2120 (LMM)

ANTI-MONOPOLY, INC.,

Plaintiff,

-against-

HASBRO, INC., TOYS "R" US, INC.

and

K MART CORPORATION,

Defendants.

1995 U.S. Dist. LEXIS 8822; 1995-2 Trade Cas. (CCH) P71,095

June 26, 1995, Decided

June 27, 1995, Filed

* * *

Appendix C

JUDGES: LAWRENCE M. McKENNA, U.S.D.J.

OPINION BY: LAWRENCE M. McKENNA

OPINION: MEMORANDUM AND ORDER

McKENNA, D.J.

Plaintiff, Anti-Monopoly Inc. ("Anti-Monopoly"), brought this action against defendants Hasbro, Inc. ("Hasbro"), Toys "R" Us, Inc. ("Toys"), and K-Mart Corp. ("K-Mart") (together "Defendants"), alleging a conspiracy to allow Hasbro to monopolize the family board game market. Defendants have moved individually pursuant to Fed. R. Civ. P. 12(b)(6) to dismiss some or all of the claims for failure to state claims upon which relief can be granted. Anti-Monopoly has cross-moved pursuant to Fed. R. Civ. P. 15 for leave to amend its Amended Complaint. For the reasons stated below, Defendants' motions are granted in part and denied in part, and Anti-Monopoly's motion is granted.

Facts

Anti-Monopoly developed and markets a family board game called Anti-Monopoly and currently possesses less than 1% of the market for family board games. Hasbro, Anti-Monopoly's competitor, is the leading manufacturer of family board games, with more than 80% of the market. Toys is the largest retailer of family board games with about 35-40% of the retail market. K-Mart is the second largest retailer of board games with about 15% of the retail market. Anti-Monopoly and Hasbro compete directly for space in retail stores like Toys and Hasbro. (Proposed Second Am. Compl. ("Compl.") PP 4-7, 25.)

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Anti-Monopoly's proposed Second Amended Complaint alleges that Hasbro has for more than a decade been gradually increasing its market share through the acquisition of smaller family board game manufacturers such as Ideal Toys and Parker Brothers, as well as by certain practices which violate federal antitrust law. Most of those practices are not the subject of this motion, as Hasbro has not moved to dismiss Anti-Monopoly's claim under § 2 of the Sherman Act. Toys and K-Mart are alleged to be co-conspirators in Hasbro's schemes standing to benefit from helping Hasbro develop monopoly power in the relevant market.

The Amended Complaint includes eight separate counts against all three defendants and Anti-Monopoly has cross-moved for leave to add an additional Count (Count IX) in its proposed Second Amended Complaint. The Court must address the motion to Amend and then each defendant's motion to dismiss each count.

II. Motion to Amend Amended Complaint

Anti-Monopoly has moved to amend to add certain supplemental allegations as well as an additional count.

In their motions to dismiss, Defendants have only addressed two substantive changes to Anti-Monopoly's Complaint: a revision in the definition of the relevant market and a new claim (Claim IX) alleging violation of § 3 of the Clayton Act. The Court takes each of these in turn and otherwise grants Anti-Monopoly's request to make all other changes proposed in its Second Amended Complaint.

Leave to amend a complaint shall be freely given when justice so requires. Fed. R. Civ. P. 15(a).

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The rule in this Circuit has been to allow a party to amend its pleadings in the absence of a showing by the nonmovant of prejudice or bad faith. . . . In determining what constitutes "prejudice," we consider whether the assertion of the new claim would: (i) require the opponent to expend significant additional resources to conduct discovery and prepare for trial; (ii) significantly delay the resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in another jurisdiction.

Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993) (citations omitted).

A.

Hasbro's opposition to Anti-Monopoly's proposal to redefine the relevant market is twofold: first, that the definition is overly narrow, and, second, that Hasbro would be prejudiced in that it has already prepared a defense based on the original definition of the market and would be forced to incur a substantial cost to refine its defense based on the revised definition.

Definition of the relevant market is "the first step in a court's analysis" of an alleged antitrust violation. Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 268 (2d Cir. 1979). "A complaint must allege a relevant product market in which the anticompetitive effects of the challenged activity can be assessed. The relevant product market includes all products reasonably interchangeable, determination of which requires consideration of cross-elasticity of demand." Re-Alco Indus., Inc. v. National Ctr. for Health Educ., Inc., 812 F. Supp. 387, 391 (S.D.N.Y. 1993) (citations omitted).

Appendix C

In its Amended Complaint, Anti-Monopoly defined the relevant product market as "board games". (Am. Compl. P 15.) In its proposed Second Amended Complaint, Anti-Monopoly seeks to redefine the relevant market as "family board games" and the relevant submarket as "monopoly-type family board games". (Compl. P 15.) "Family board games" are defined as "non-strategy board games, in which players move tokens on a board surface, and the games are suitable for players at least 7-8 years old and are targeted for group play which does not exclude the 7 or 8 to 18 year age group." (Id. P 12.) "Monopoly-type family board games" means family board games based on some of the monopolistic features of real estate, including the payment of rents. (Id.)

The definition of the relevant market lies initially with the plaintiff. Defendants will have their opportunity to challenge Anti-Monopoly's definition, but the Court must accept a reasonable definition on the face of the Complaint. Minpeco, S. A. v. ContiCommodity Servs., 552 F. Supp. 327, 331 (S.D.N.Y. 1982) ("Rule 8 does not require that a plaintiff 'define specifically the boundaries of its purported market.' . . . Questions of market definition can be narrowed and determined through the discovery process."). Unless the proposed definition is patently over- or under-inclusive, the Court must accept the plaintiff's proposed definition. "Family-board games" is not a patently under-inclusive definition and the Court will allow Anti-Monopoly to redefine the relevant market in its Second Amended Complaint.[1]

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1. The Court also grants Anti-Monopoly's motion to redefine the market to include a submarket of "monopoly-type family board games," but notes, without at this time so holding, that the definition appears too narrow to be relevant for purposes of an antitrust claim.

Turning to Hasbro's argument that it will be forced to incur a substantial cost in revising its defense, the Court may consider, at a later stage of this litigation, an order requiring Anti-Monopoly to pay Hasbro for specifically identifiable additional costs incurred by Hasbro as a result of having had to defend based on the original definition.[2] See Ovitz v. Jefferies & Co., 102 F.R.D. 242, 244 (N.D. Ill. 1984).

B.

Hasbro's only opposition to the addition of Count IX is that the amendment would be futile.[3]

Section 3 of the Clayton Act provides

> It shall be unlawful for any person engaged in commerce . . . to make a sale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

15 U.S.C. § 14.

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2. Anti-Monopoly would not be responsible for costs incurred in formulating elements of the initial defense that are still valuable to Hasbro for purposes of a new defense. It is not at all clear which costs incurred to date as a result of Anti-Monopoly's original market definition will remain of value throughout this litigation.

3. Anti-Monopoly has withdrawn Count IX as to Toys and K-Mart. (Pl. Reply Br. at 9.)

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In proposed Count IX, Anti-Monopoly alleges Hasbro has violated § 3 of the Clayton Act by "making sales of family board games to K-Mart, Toys and the other alleged co-conspirators on terms which require them not to buy family board games from plaintiff and other small family board game competitors." (Id. P 93.) Having tracked the language of the statute and included a number of factual allegations to support its theory, Anti-Monopoly has adequately pled a claim under § 3 of the Act. Therefore, the Court grants Anti-Monopoly's motion to add Count IX.[4]

III. Rule 12(b)(6) Standards in Antitrust Cases

"[A] short plain statement of a claim for relief which gives notice to the opposing party is all that is necessary in antitrust cases, as in other cases under the Federal Rules." George C. Frey Ready-Mixed Concrete, Inc. v. Pine Hill Concrete Mix Corp., 554 F.2d 551, 554 (2d Cir. 1977) (citing Nagler v. Admiral Corp., 248 F.2d 319 (2d Cir. 1957), and 5 Charles Alan Wright & Arthur Miller, Federal Practice & Procedure, § 1228 (1969)). In considering the complaint on a motion under Fed. R. Civ. P. 12(b)(6), "the Court must accept the pleader's allegations of facts as true together with such reasonable inferences as may be drawn in [the pleader's] favor." Deep South Pepsi-Cola Bottling Co. v. PepsiCo, Inc., 1989 U.S. Dist. LEXIS 4639, at *12, 1989 WL 48400, at 5 (S.D.N.Y. May 2, 1989). That does not mean that "conclusory allegations which merely recite the litany of antitrust will . . . suffice." John's Insulation, Inc. v. Siska Constr. Co., 774 F. Supp. 156, 163

4. Having granted Anti-Monopoly's motion to amend the Complaint, all references to a Complaint are to the Second Amended Complaint unless otherwise noted.

(S.D.N.Y. 1991). An antitrust complaint must "adequately . . . define the relevant product market, . . . allege antitrust injury, [and] . . . allege conduct in violation of the antitrust laws." Re-Alco Indus., Inc. v. National Ctr. for Health Educ., Inc., 812 F Supp. 387, 391 (S.D.N.Y. 1993).

Furthermore, it has been very persuasively argued that an antitrust plaintiff whose complaint is challenged must articulate "a careful statement of his legal theory." Phillip Areeda & Donald F. Turner, Antitrust Law, P 317e (1978). It is not clear however, in the Second Circuit, that the theory — as distinguished from the facts supporting it — must be set forth in the complaint itself, see George C. Frey, 554 F.2d at 554, but it is nevertheless not too much to ask that the theory — or "alternative or multiple legal theories," Areeda & Turner, P 317e — at least be fully argued in response to a dispositive motion. Not only will such argument enable a court to see how the facts alleged, if proved, would constitute a violation of the Sherman Act, but "the recommended specificity focuses discovery and thereby saves both parties' energies and costs." Id. "The heavy costs of modern federal litigation, especially antitrust litigation, and the mounting caseload pressures on the federal courts, counsel against launching the parties into pretrial discovery if there is no reasonable prospect that the plaintiff can make out a cause of action from the events narrated in the complaint." Sutliff, Inc. v. Donovan Cos., Inc., 727 F.2d 648, 654 (7th Cir. 1984) (Posner, J.).

The Court therefore examines the Complaint and Anti-Monopoly's opposition brief to discern whether Anti-Monopoly has stated a basic, but coherent, theory of how the Defendants have violated the antitrust laws.[5]

5. The Court reminds Plaintiff of the warning of Judge McCurn of the Northern District of New York: "[Plaintiff has] made the (Cont'd)

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IV. Count I: § 2 of the Sherman Act

In Count I, Anti-Monopoly alleges that Defendants have violated § 2 of the Sherman Act by monopolizing, willfully attempting to monopolize, and combining and conspiring with various co-conspirators to monopolize, the manufacturing and sate of family board games. (Compl. P 29.) Only Toys and K-Mart have moved to dismiss Count I. In its responsive brief Anti-Monopoly concedes that its only claim against Toys and K-Mart under § 2 of the Sherman Act is for conspiracy to monopolize. (Pl. Br. at 2829.)

The conspiracy to monopolize offense consists of three elements: 1) concerted action, 2) overt acts in furtherance of the conspiracy, and 3) a specific intent to monopolize. Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988).

Anti-Monopoly's allegations that Toys and K-Mart have conspired with Hasbro are highly speculative and come dangerously close to being subject to dismissal for lack of allegations of supporting facts. See Heart Disease Research Foundation v. General Motors Corp., 463 F.2d 98, 100 (2d Cir. 1972) ("Although the Federal Rules permit statement of ultimate facts, a bare bones statement of conspiracy or of injury under the antitrust laws without any supporting facts permits

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(Cont'd)
court's task in deciding these motions particularly arduous due to [its] poorly drafted pleadings and memoranda of law. Counsel [is] forewarned that in the future motion papers such as these will simply be returned. The court is burdened enough without having to do legal research for counsel and speculate as to the exact nature of a given claim or argument." Repasky v. Orzel, 1991 U.S. Dist. LEXIS 2668.

dismissal."); Garshman v. Universal Resources Holding Inc., 824 F.2d 223, 230 (3d Cir. 1987) ("The allegation of unspecified contracts with unnamed other entities to achieve unidentified anticompetitive effects does not meet the minimum standards for pleading a conspiracy in violation of the Sherman Act.") Nevertheless, the Court finds that Anti-Monopoly has stated a claim. Clearly, Anti-Monopoly has alleged concerted action by Defendants to exclude Anti-Monopoly from the market as well as overt acts, the refusals to deal; and all of this with the specific intent to conspire. (Compl. P 29.)

The Court notes, however, that Anti-Monopoly's theory seems, on its face, highly implausible. As customers of Hasbro, now and in the future, it does not make too much economic sense that Toys and K-Mart would help Hasbro gain monopolistic power in the relevant market. As a monopolist, Hasbro would be in a position to dictate higher wholesale prices for its products to Toys and K-Mart. However, the Court will not dismiss the Complaint at this early stage of the proceeding without allowing Anti-Monopoly a chance to develop its case in discovery.

Toys and K-Mart also rely on caselaw suggesting that activity that "is as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S." 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). See also Venture Tech., Inc. v. National Fuel Gas Co., 685 F.2d 41, 48 (2d Cir. 1982). Although these cases are closely analogous, they each involved disputes in which discovery had been conducted and had been litigated to or beyond a motion for summary judgment. The Court is hesitant to extend the reasoning of these cases to a motion to dismiss on

the face of the Complaint. Anti-Monopoly's allegations, if still unsupported following discovery, may not be sufficient to survive a motion for summary judgment, but they are sufficient to state a claim upon which relief can be granted.

Toys' and K-Mart's motions to dismiss Count I are denied.

Count II: Essential Facility

In Count II, Anti-Monopoly alleges that Hasbro's control of Toys and K-Mart constitutes monopolization of an essential facility in violation of § 2 of the Sherman Act. (Compl. P 42.)

The essential facility doctrine is not a separate violation of antitrust law, but rather is "a label that may aid in the analysis of a monopoly claim." Viacom Int'l, Inc. v. Time Inc., 785 F. Supp. 371, 376 n.12 (S.D.N.Y. 1992). In an early formulation, "the essential facility doctrine, also called the 'bottleneck principle,' states that 'where facilities cannot practicably be duplicated by would-be competitors, those in possession of them must allow them to be shared on fair terms. It is illegal restrains of trade to foreclose the scarce facility.' " Hecht v. Pro-Football, Inc., 187 U.S. App. D.C. 73, 570 F.2d 982, 992 (D.C. Cir. 1977) (quoting A. O. Neale, The Antitrust laws of the United States, at 67 (2d ed. 1970)) (footnote omitted), cert. denied, 436 U.S. 956, 57 L. Ed. 2d 1121, 98 S. Ct. 3069 (1978). The "essential facility" doctrine, however, is in tension with another doctrine: "Antitrust law . . . does not require one competitor to give another a break just because failing to do so offends notions of fair play." Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566, 568 (2d Cir. 1990).

To prove monopolization of an essential facility, Anti-Monopoly must prove four elements: "(1) control of the

essential facility by a monopolist; (2) a competitor's inability practically or reasonably to duplicate the essential facility; (3) the denial of the use of the facility to a competitor; and (4) the feasibility of providing the facility." MCI Comm. v. American Tel. & Tel. Co., 708 F.2d 1081, 1132 (7th Cir. 1983). The first and third elements go to defendant's degree of control while the second and fourth go to determining whether the facility is truly "essential".

The Court first addresses the issue of control. In most of the "essential facility" cases, control stemmed from the defendants' ownership, individually or collectively, of the facility. However, in this case; the control of the facility stems not from ownership, but from an alleged system of price incentives and threats designed to force the owner of the facility not to make it available to a competitor. Although it is a novel theory of control, and represents an extension of the "essential facility" doctrine, the Court will not say at this point that Anti-Monopoly has not adequately pled control of Toys and K-Mart.

Nevertheless, the Court finds as a matter of law that Toys and K-Mart do not constitute an essential facility. The Second Circuit most recently discussed the doctrine in Twin Labs., Inc. v. Weider Health & Fitness, 900 F.2d 566 (2d Cir. 1990):

> A leading antitrust commentator would limit the analysis to "facilities that are a natural monopoly, facilities whose duplication is forbidden by law, and perhaps those that are publicly subsidized and thus could not practicably be built privately." Most of the successful essential facility claims fall within the categories stated by this commentator. In cases finding liability in other categories, however, the

> facility in question was more than dominant; it was effectively the only one in town.

Id. at 569 (quoting Phillip Areeda & Herbert Hovenkamp, Antitrust Law, § 736.2 (Supp. 1988)) (other citations omitted). "A plaintiff must show more than inconvenience or even some economic loss; he must show that an alternative to the facility is not feasible." Twin Labs., 900 F.2d at 570.

There is no suggestion that Toys and K-Mart's stores are "facilities whose duplication is forbidden by law" or that they are "publicly subsidized and thus could not practicably be built privately." Nor are they a "natural monopoly" — or the result of a "natural monopoly" — or the "only [facility] in town." Anti-Monopoly does not allege that there are not many independent stores retailing toys and board games that Anti-Monopoly is free to use to reach the public for the sale of its products. The essential facility doctrine cannot be read so broadly as to mean that a plaintiff is entitled to any facility it finds desirable or convenient, or that retailers must stock every product of a given type.

The Court grants Defendants' motion to dismiss Count II.

Count III: Tortious Interference with Advantageous Business Relationships

Under New York law, to prevail on a claim of tortious interference with prospective business relations, a plaintiff must demonstrate that the defendant interfered with business relations existing between a plaintiff and a third party, either with the purpose of harming the plaintiff or by means that are dishonest, unfair, or improper.

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Volvo North America Corp. v. Men's Int'l Professional Tennis Council, 857 F.2d 55, 74 (2d Cir. 1988). "If the defendant's interference is intended, at least in part, to advance its own competing interests, the claim will fail unless the means employed include criminal or fraudulent conduct." PPX Enters., Inc. v. Audiofidelity Enters., Inc., 818 F.2d 266, 269 (2d Cir. 1987). The tort usually involves a business relationship that is something less than contractual in nature. Volvo, 857 F.2d at 74.

In Count III, Anti-Monopoly makes a series of separate allegations suggesting that the Defendants have interfered, individually and collectively, with certain business relationships. (Compl. PP 48-51.) The Court must take this complicated series of allegations separately.

A.

First, Anti-Monopoly alleges that the Defendants have interfered with Anti-Monopoly's relationships with other major retailers. However, the Second Amended Complaint does not provide any factual basis for this allegation. The essence of the Complaint is that Hasbro has conspired with Toys and K-Mart to exclude Anti-Monopoly from the market. There is no allegation, however, that either Hasbro, Toys or K-Mart has encouraged any other retailer to not deal with Anti-Monopoly. Hasbro has not even named any other major retailer who has refused to deal with Anti-Monopoly.

B.

Second, Anti-Monopoly alleges that Toys and K-Mart have each conspired with Hasbro to interfere with Anti-Monopoly's

relationship with the other. However, Anti-Monopoly has not plead any facts suggesting that either Toys or K-Mart has committed any act that would interfere with Anti-Monopoly's relationship with the other. According to the Complaint, Toys and K-Mart each entered into agreements with Hasbro that they would not deal with Anti-Monopoly in exchange for favorable prices.

C.

Finally, Anti-Monopoly alleges that Hasbro has interfered with Anti-Monopoly's relationship with Toys and K-Mart by inducing them to not deal with Anti-Monopoly. Hasbro concedes that such action constitutes interference with a business relation, but argues that because the alleged interference is intended, at least in part, to advance its own competing interests, the claim must fail because Anti-Monopoly has not alleged that the conduct is criminal or fraudulent as required by the caselaw.

The Court cannot agree. Although, Anti-Monopoly does not expressly claim that Hasbro's conduct is criminal, the Court notes that almost the entire Complaint is devoted to allegations that Hasbro has been violating, and continues to violate, the Sherman Antitrust Act, a federal criminal statute. If Anti-Monopoly can prove that Hasbro has violated the antitrust acts, such conduct should be sufficiently criminal to constitute the predicate required for the tort of tortious interference. See Van Natta Mech. Corp. v. Di Staulo, 277 N.J. Super. 175, 649 A.2d 399, 407-08 (N.J. Sup. Ct. App. Div. 1994) ("The grounds for the antitrust violation could nonetheless be used to prove defendants' unlawful, anti-competitive acts.").

The Court grants Toys' and K-Mart's motions to dismiss but denies Hasbro's motion to dismiss Count III insofar as that

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Count is based on the ground considered in C, above. Count III otherwise dismissed as to all defendants.

Count IV: Unfair Competition

In Count IV, Anti-Monopoly alleges that Defendants have appropriated Anti-Monopoly's market share, i.e. its customers, by means of unfair competition.

The tort of unfair competition is not some amorphous catch-all claim to be appended to any complaint involving claims that a competitor has injured a business rival. It is a specific claim with distinct elements. Saratoga Vichy Spring Co. v. Lehman, 625 F.2d 1037, 1044 (2d Cir. 1980). Plaintiff must allege "1) acts or omissions by defendants that proximately caused a misappropriation; and 2) the property or benefit misappropriated." Volvo, 857 F.2d at 75. The tort "usually concerns the taking and use of the plaintiff's property to compete against the plaintiff's own use of the same property." Roy Export Co. Estab. of Vaduz v. Columbia Broadcasting, 672 F.2d 1095, 1105 (2d Cir. 1982). See also, Saratoga Vichy Spring Co. v. Lehman, 625 F.2d 1037, 1044 (2d Cir. 1980) ("The essence of an unfair competition claim under New York law is that the defendant has misappropriated the labors and expenditures of another."). Failure to allege with specificity what property has been misappropriated will result in dismissal of the claim. Volvo, 857 F.2d at 75; Data Broadcasting Corp. v. Tele-Communications, Inc., 1992 U.S. Dist. LEXIS 16881, 1992 Wl 350624, *4 n.4 (S.D.N.Y. 1992).

Anti-Monopoly has not identified any misappropriated property in the Complaint. In response to Defendants' challenge, Anti-Monopoly suggests in its brief that it was its market share

that had been taken and that "appropriation of a competitor's customers is in the long run what unfair competition is about." (Pl. Br. at 27.) Anti-Monopoly's theory is creative but unpersuasive. Loss of market share may by the ultimate consequence of an act of unfair competition, as it is for any business tort, but, standing alone, it does not state a claim. There is no allegation that the Defendants have used or appropriated any of Anti-Monopoly's products or properties. While the tort of unfair competition may be flexible and expansive, Roy Export, 672 F.2d at 1105, it does not encompass a claim that the only "property" appropriated is plaintiff's market share. See Nifty Foods Corp. v. Great Atlantic & Pacific Tea Co., Inc., 614 F.2d 832, 842 (2d Cir. 1980).

Defendants' motion to dismiss Count IV is granted.

Count V: Cancellation of Patents and Copyrights

Although Anti-Monopoly characterizes this as a cause of action, it is a statement of a form of relief sought under other claims, more properly considered should Anti-Monopoly prove a violation of the antitrust laws. Accordingly, Count V is dismissed, without prejudice to consideration at an appropriate time of forms of relief to which Anti-Monopoly may be entitled.

Count VI: § 7 of the Clayton Act

In Count VI, Anti-Monopoly alleges that Hasbro has violated § 7 of the Clayton Act by acquiring the stock and the whole and part of the assets of various corporations engaged in competition with Hasbro where the effect has been to substantially lessen competition and to create a monopoly in such markets. (Compl. P 66.)

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§ 7 of the Clayton Act provides:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person . . . shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

15 U.S.C. § 18.

Anti-Monopoly's allegations clearly state a claim upon which relief can be granted. Anti-Monopoly has alleged that Hasbro has dramatically increased its share of the family board game market by purchasing a number of smaller companies and is approaching 90% control of the market. Such a development could certainly have the effect of substantially lessening competition or creating a monopoly by concentrating virtually all the manufacturing power in one manufacturer. The Court denies Hasbro's motion to dismiss Count VI.[6]

Anti-Monopoly has not shown that § 7 of the Clayton Act imposes liability on any party other than the acquirer, Hasbro.

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6. Rather than focusing on the sufficiency of the allegations, Hasbro bases its motion on Anti-Monopoly's requested relief for an order compelling divestiture of the acquisitions. However, the issue for the Court at this time is not what relief is appropriate, but whether Anti-Monopoly has stated a claim under the law.

Therefore, the Court grants Toys' and K-Mart's motions to dismiss Count VI.

Count VII: § 2 of the Clayton Act

In Count VII, Anti-Monopoly alleges that Hasbro has violated the Robinson-Patman Act (§ 2 of the Clayton Act) by "providing substantial discounts, terms and services to major family board game retailers which are not made available on equal terms to competing smaller family board game retailers and wholesalers and which are not either cost justified or otherwise permitted under § 2." (Compl. P 76).

§ 2 of the Clayton Act provides:

> It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them.

15 U.S.C. § 13(a).

A claim under § 2 of the Clayton Act is similar to a claim for predatory pricing under § 2 of the Sherman Act: "The essence of the claim under either statute is the same: A business rival has priced its products in an unfair manner with an object

to eliminate or retard competition and thereby gain and exercise control over prices in the relevant market." Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 125 L. Ed. 2d 168, 113 S. Ct. 2578, 2587 (1993). Under either claim, plaintiff must prove two elements: (1) "that the prices complained of are below an appropriate measure of its rival's costs" and (2) there exists "a reasonable prospect . . . of recouping its investment in below-cost prices." Id; at 2487-88. Although there is no well settled benchmark for determining "an appropriate measure of [a company's] costs," it has been suggested that, in the Second Circuit, the appropriate standard may be "reasonably anticipated average variable cost." Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc., 845 F.2d 404, 407 (2d Cir. 1988).

Two classes of plaintiffs are recognized to have standing to bring a Robinson-Patman claim. Direct competitors of the predator are said to suffer primary-line injury when they are unable to match the predator's prices and must either sell at a loss or lose market share. Competitors of the favored purchasers are said to suffer secondary-line injuries when they are forced to compete in the same market as the purchasers who are enjoying the benefit of lower overhead for the same product. Anti-Monopoly has argued that it has suffered both types of injuries.

Defendants' only ground for dismissal of Count VII was the absence of an allegation that Hasbro prices its products below an appropriate measure of its costs. With the filing of its Second Amended Complaint, Anti-Monopoly has now remedied that deficiency in. (Compl. P 31W). Furthermore, it can fairly be inferred that there is a reasonable prospect that Hasbro would recoup its investment if it were able to eliminate the remaining board game manufacturers.

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Because the Court agrees that Anti-Monopoly has stated a claim for a primary-line injury, the Court does not address at this time Anti-Monopoly's claim that it has suffered a secondary-line injury. The Court denies Hasbro's motion to dismiss Count VII.

However, the Statute does not impose liability on the beneficiaries of the advantageous pricing. The Court therefore grants Toys' and K-Mart's motions to dismiss Count VII.

Count VIII: Section 1 of the Sherman Act

In Count VIII, Anti-Monopoly alleges that Defendants have violated § 1 of the Sherman Act: The "activities of the defendants . . . constitute an illegal antitrust contract, conspiracy and combination to unreasonably restrain trade in the" relevant market and involve "concerted action between Hasbro and each of the two co-defendants." (Compl. P 87.)

"The section 1 claimant must demonstrate (1) concerted action by two or more persons which (2) unreasonably restrains interstate trade or commerce." Broadcast Music, Inc. v. Hearst/ABC Viacom Entertainment Servs., 746 F. Supp. 320, 325 (S.D.N.Y. 1990). "Unlike the proof required to establish a conspiracy to monopolize under section 2, a specific intent to create a monopoly is not required under section 1." International Distribution Centers, Inc. v. Walsh Trucking Co., Inc., 812 F.2d 786, 793 (2d Cir.).

"It is the rare case in which a plaintiff bringing a § 1 claim can establish the existence of an explicit agreement among the defendants; most conspiracies are proven by inferences drawn from behavior of the alleged conspirators." Caldwell v. American Basketball Ass'n, Inc., 825 F. Supp. 558, 566 (S.D.N.Y. 1993).

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Once again the Court must infer the exact nature of Anti-Monopoly's allegations from an inartfully pled Complaint. Anti-Monopoly has alleged a scheme, masterminded by Hasbro, and participated in by Toys and K-Mart, to restrain trade by excluding Anti-Monopoly from the marketplace. The factual basis for the allegation leaves much to be desired, but the Court will not dismiss Count VIII on its face.

As with their motion to dismiss Anti-Monopoly's § 2 claim, Toys and K-Mart rely on cases holding that conduct that is "as consistent with permissible competition as with illegal conspiracy does not, standing alone, support an inference of antitrust conspiracy." See, e.g., Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 588, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986). However, as noted supra pp. 10-11, those decisions involved cases developed up to or beyond the summary judgment stage, and are therefore not appropriate authority on a motion to dismiss.

Defendants' motion to dismiss Count VIII is denied.

V.

The Court grants Hasbro's motion to dismiss Counts II, IV, and V, grants in part and denies in part Hasbro's motion to dismiss Count III, and denies Hasbro's motion to dismiss Counts VI-IX. The Court grants Toys' and K-Mart's motions to dismiss Counts II-VII and denies their motion to dismiss Counts I and VIII. Anti-Monopoly has withdrawn Count IX as to Toys and K-Mart.

Dated: New York, New York
June 26, 1995

Appendix C

SO ORDERED

LAWRENCE M. McKENNA

U.S.D.J.

APPENDIX D — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED JUNE 2, 1994

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

94 Civ. 2120 (LMM)

1994 U.S. Dist. LEXIS 7232

ANTI-MONOPOLY, INC.,

Plaintiff,

v.

HASBRO, INC., TOYS "R" US, INC. and K MART CORPORATION,

Defendants.

1994 U.S. Dist. LEXIS 7232

June 1, 1994, Decided

June 2, 1994, Filed

JUDGES: McKENNA

OPINION BY: LAWRENCE M. McKENNA

Appendix D

OPINION: MEMORANDUM AND ORDER

McKENNA, D.J.

I.

The motion of defendant Hasbro, Inc. ("Hasbro") for an order, pursuant to 28 U.S.C. § 1404, transferring this action to the United States District Court for the District of Massachusetts, Western (Springfield) Section, is denied, subject to the conditions set forth below.[1]

The relevant criteria to be considered by a District Court in considering a motion for a transfer to another District are:

(1) where the operative facts occurred;

(2) the location of relevant witnesses and documents;

(3) the convenience of the parties;

(4) the applicable state law;

(5) the plaintiff's choice of forum; and

(6) the docket conditions of the transferor and transferee districts.

Kanbar v. U.S. Healthcare, Inc., 715 F. Supp. 602, 605 (S.D.N.Y. 1989) (citations omitted) (Walker, J.).

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1. The proper relief, were the motion to be granted, would be to transfer the action to the District of Massachusetts, and to leave it to that District to assign the case, or not, to its Western (Springfield) Section.

Here, the operative facts consisting of Hasbro's relevant marketing decisions (made by or through its Milton Bradley and Parker Brothers divisions) no doubt occurred in the District of Massachusetts. There are, however, other operative facts which occurred in other parts of the country: the impact, if any, on plaintiff will have occurred in California, the state of its incorporation and principal place of business. (Cplt. P 4.) Under plaintiff's theory, the operative facts will include not only Hasbro's marketing practices but their affect on retail stores — large or small — throughout the country. Similarly, relevant witnesses to the extent they are Hasbro officers and employees, and relevant documents to the extent they are Hasbro documents, are located in Massachusetts. But in all probability there will be other, non-party, witnesses and documents relevant to this case, such as retailers, and their documents relevant to issues concerning Hasbro's challenged practices. As regards convenience of the parties, a transfer to the District of Massachusetts would plainly convenience Hasbro. The Court does not regard applicable state law as a significant factor in this case based principally on the federal antitrust laws, and, as far as the pendant state claims are concerned, on much the same facts as are asserted in support of the antitrust claims. While it appears that, at present, the docket conditions in at least the Western (Springfield) Division of the District of Massachusetts are more favorable to an earlier trial than those in this District, the Court notes that nominations by the President to this Court should, in the foreseeable future, substantially ameliorate docket conditions here. The first five factors, in sum, and on the facts of this particular case, are not conclusive.[2]

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2. The Court does not understand the other defendants, incorporated in and having their principal places of business in, respectively, New Jersey (Toys "R" Us, Inc.) and Michigan (K Mart Corporation) to have taken any strong position on the present motion, although they do not oppose it.

In such a case, it is proper to allow plaintiff its choice of forum. That choice, however, must be honored in a manner that is fair to Hasbro. It cannot be doubted that plaintiff will have to seek a great deal of discovery from Hasbro to prove its case. Hasbro should not be put to unnecessary burdens and expense by having to defend outside of the District where most of the officers and employees, and records, concerned with this case are located. Accordingly, the Court directs that, at the option of Hasbro:

(1) all depositions of Hasbro's (including Milton Bradley's and Parker Brothers') officers and employees are to be conducted in the District (Massachusetts, Rhode Island, New York or other) in which they regularly work;

(2) all documents to be produced by Hasbro are to be produced at the location where they are regularly kept;

(3) all depositions of plaintiff's officers and employees are to be conducted in New York; and

(4) all documents to be produced by plaintiff are to be produced in New York.

II.

Plaintiff's cross-motion for an order adjourning Hasbro's motion under 28 U.S.C. § 1404 to enable plaintiff to identify local witnesses, and to obtain discovery in New York prior to transfer, is denied as moot.

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III.

The case is designated as Complex and referred to Magistrate Judge Roberts for General Pretrial purposes. Prior to meeting with the Magistrate Judge, counsel for all parties are to promptly meet, confer and develop a discovery plan. The Magistrate Judge shall have authority to set discovery cutoff and pretrial order dates, and any intermediate dates relating to discovery. Any dispositive motions are to be made before the undersigned.

SO ORDERED.

Dated: New York, New York
June 1, 1994

LAWRENCE M. McKENNA

U.S.D.J.

APPENDIX E — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK FILED MAY 23, 1994

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

94 Civ. 2120 (LMM)

ANTI-MONOPOLY, INC.,

Plaintiff,

v.

HASBRO, INC., TOYS "R" US, INC. and
K MART CORPORATION,

Defendants.

1994 U.S. Dist. LEXIS 6769

May 23, 1994, Decided

May 23, 1994, Filed

JUDGES: McKENNA

OPINION BY: LAWRENCE M. McKENNA

OPINION: MEMORANDUM AND ORDER

Appendix E

McKENNA, D.J.

I.

Plaintiff's motion for a preliminary injunction against the acquisition by defendant Hasbro, Inc. ("Hasbro") during the pendency of this action of any board-game assets from Western Publishing Group, Inc. ("Western") or any other board-game manufacturer, or the acquisition by Hasbro of Western or any other board-game manufacturer, is denied.

In Reuters Ltd. v. United Press Int'l, Inc., 903 F.2d 904 (2d Cir. 1990), the court pointed out that:

> Because a showing of probable irreparable harm is " 'the single most important prerequisite for the issuance of a preliminary injunction," ' the moving party must first demonstrate that such injury is likely before the other requirements for the issuance of an injunction will be considered. Irreparable harm must be shown by the moving party to be imminent, not remote or speculative, and the alleged injury must be one incapable of being fully remedied by monetary damages.

903 F.2d at 907 (citations omitted). Plaintiff has not made the requisite showing of probable irreparable harm.

Plaintiff's argument is to the effect that, if Hasbro is permitted to acquire from Western, as planned, the rights to six games now distributed by Western — Pictionary, Outburst, Girl Talk, Hi Ho Cherry-O, Pretty Princess and Balderdash —

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Hasbro's market share in the sale of board-games will increase from 75% to 80%, or as much as 84%, that that increase in market share will enhance Hasbro's ability to grant substantial (and allegedly illegal) discounts, and other services, to volume retailers (such as defendants Toys "R" Us, Inc. and K Mart Corporation), that sales by such volume retailers will thus increase to the detriment of small retailers (plaintiff's principal means of marketing its game, Anti Monopoly), to whom such discounts and services are said not to be available from Hasbro, with the consequence that many of such small retailers will go out of business, thus reducing plaintiff's already small sales to the point where plaintiff will have to go out of business.

Plaintiff's statements about the impact on it of the Hasbro acquisition of the rights to the Western games, however, are highly conclusory. "The plaintiff cannot afford any more loss of business, and the plaintiff is on the verge of failure at this time and expects to have to go out of business if the industry becomes any more concentrated." (Anspach Decl., Apr. 27, 1994, P 14.)[1] "Already, plaintiff is at a break-even point, and any further loss of accounts and sales will cause plaintiff to become unprofitable and drive plaintiff out of business." (Id. P 16.) "If plaintiff's sales do not increase significantly within the next year, plaintiff may have to go out of business for the lack of business and lack of profitability." (Anspach Decl., May 16, 1994, P 18B.) Such statements are an insufficient basis upon which to find irreparable harm.

In Auto Sunroof of Larchmont, Inc. v. American Sunroof Corp., 639 F. Supp. 1492 (S.D.N.Y. 1986), Judge Weinfeld, in denying a motion for a preliminary injunction in a case in which the plaintiff claimed that the action on the part of the defendant sought to be enjoined would put the plaintiff out of business,

1. Mr. Anspach is president of plaintiff.

pointed out that:

> Plaintiff, however, has offered no proof that it will be put out of business. Instead of presenting concrete data on how much of its business is from Linden and how close it already is to business failure, plaintiff offers only the self-serving statement of its President that its business will collapse. With nothing more than this statement, plaintiff's claim is speculative.

639 F. Supp. at 1494. See also Paramount Brands, Inc. v. Peerless Importers, Inc., 1992 WL 355601 (E.D.N.Y. Nov. 19, 1992) at *5 ("Where the claim is made that a firm will go out of business, a plaintiff must offer detailed information about its finances.") (citing Auto Sunroof, 639 F. Supp. at 1494)). Plaintiff's showing here is equally lacking in the requisite detail concerning its business and finances.

Short of being put out of business, of course, plaintiff is not entitled to a preliminary injunction. Losses can be recompensed by money damages, white, to obtain a preliminary injunction, "the alleged injury must be one incapable of being fully remedied by monetary damages." Reuters, 903 F.2d at 907.

Since plaintiff has not made the requisite showing of probable irreparable injury, the other requirements for a preliminary injunction need not be considered. Id. Further, since the irreparable injury issue is dispositive, and since the facts required to be shown as to this issue — involving plaintiff's business and finances — are fully within plaintiff's knowledge, there is no need to hold an evidentiary hearing.

SO ORDERED.

Dated: New York, New York
May 23, 1994

LAWRENCE M. McKENNA

U.S.D.J.

APPENDIX F — ROBINSON-PATMAN ACT, § 2(a), 15 U.S.C.A. 13(a)

Price; selection of customers. It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, where either or any of the purchases involved in such discrimination are in commerce, where such commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: Provided, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: Provided, however, That the Federal Trade Commission may, after due investigation and hearing to all interested parties, fix and establish quantity limits, and revise the same as it finds necessary, as to particular commodities or classes of commodities, where it finds that available purchasers in greater quantities are so few as to render differentials on account thereof unjustly discriminatory or promotive of monopoly in any line of commerce; and the foregoing shall then not be construed to permit differentials based on differences in quantities greater than those so fixed and established: And provided further, That nothing herein contained shall prevent persons engaged in selling goods, wares, or merchandise in commerce from selecting their own customers in bona fide transactions and not in restraint

of trade: And provided further, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, such as but not limited to actual or imminent deterioration of perishable goods, obsolescence of seasonal goods, distress sales under court process, or sales in good faith in discontinuance of business in the goods concerned.

APPENDIX G — SHERMAN ACT, §§ 1-2, 15 U.S.C.A. §§ 1-2

"§ 1. Trusts, etc., in restraint of trade illegal; penalty

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

"§ 2. Monopolizing trade a felony; penalty

"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $10,000,000 if a corporation, or, if any other person, $350,000, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

APPENDIX H — CLAYTON ACT, § 3, 15 U.S.C.A. § 14

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

APPENDIX I — CLAYTON ACT, § 7, 15 U.S.C.A. § 18

"No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly."

"No person shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more persons engaged in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."